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THE SPEECH
OF THE LORD
CHANCELLOR OF
England, in the Eschequer
Chamber, touching the
Post-nati. *Egerton*



LONDON,
Printed for the Societie of
Stationers. An. 1609.

*The Printer to the courteous
Reader.*

Through great haste (the common Spoiler of most serious Labours, Hillary Terme being halfe spent ere this Booke could come forth) the word *Non*, in the 45. page, and 15. line, of all the Bookes of the first Impression was left out, which altered the Sentence to a cleane contrary Sence: Therefore, in those first imprinted Bookes, for *Quod logo, non credo*, reade *quod non logo, non credo*, according to the correction of that place in these Bookes of the second Impression.



To the louing Readers.



Before I presumed to speake in the Eschequer Chamber in R. C. Case (which is now commonly called, the Case of Post-nati,) I considered mine age and infirmities, and how long I had discontinued from

To the Readers.

such Legall Exercises. I might hereupon haue iustly challenged the priuiledge offsilence: But greater and weightier Reasons ouer ruled mee, and enforced mee to waiue the benefit of that priuiledge: For, looking into the nature of the Question then in hand, and examining the Circumstaunces, I found the Case to bee rare, and the Matter of great import and consequence, as being a speciall and principall part of the blessed and happy Union of great *Britaine*.

I heard many learned and iudicious Arguments, made by the reuerend Judges: and finding that they did not all con-

curre

To the Readers.

curre in Opinion (though the number was indeede so few, of them that differed, that in Greeke it woulde not make a plurall number) and that some things were by them omitted, which seemed to mee to be both pertinent to the Matter, and necessary to bee knowne, and more proper and fit to bee spoken by me, respecting the place I hould, than by them, that did wholy binde themselues to the forme and rule of legall Argument and Discourse : I thought that I coulde not, in duetie, sit as a dumbe and idle Hearer onelie: The Cause being iudicially depending in the high Court of

To the Readers.

Chancerie, where I was to iudge of it according to Lawe, following the rule of mine owne Conscience, and the measure of mine owne vnderstanding, and not to bee swayed vwith the vveight of other mens opinions.

I considered also, that althogh *Silentij tutum præmium* is often true in humane policie, yet sometime, there is *Crimen Reticentiae*; and therefore the Prophet said, *Væ mihi quia tacui*. And *Chrysostome* obserueth, that, *Tribus modis in veritatem peccatur*: 1. *Veritatem præ timore tacendo*: 2. *Veritatem in mendacium Committando*: 3. *Veritatem non defendendo*. Remembring this, my Con-

science

To the Readers.

Silence tould me, that howsoe-
Silence might in this Case
haue excused mee of the second,
ye I could not haue escaped by
Silence, from offending in the
first & last. And if *Festus* thought
it not reason, to send a prisoner,
without shewing the Causes
which were layed against him,
I might haue beene worthily &
justly censured, if vpon other
mens arguments, and as it vvere
fide implicita, I should haue pro-
nounced my iudgement and
sentence in so great a Cause,
vwithout deciaring the grounds
and reasons vwhereupon I stood.
Thus, Duetie and Necessitie
(for, *ratio sapienti necessitas*) were

the

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the causes that induced mee to speake in this rare and weightie cause, and the force of truth moued mee to speake that which I did speake, without respect of pleasing or displeasing any. And so, hauing the warrant of a sincere conscience, which is truly said to be, *veluti Comes, & Testis, & Index actionum*, I haue in the Chancerie iudged and decreed the Case for *R. C.* And the like Judgement is also giuen by the Judges of the Kings Bench, in the Assise depending in that Court. The decree and iudgement being thus passed, diuerse vnperfect Reports, and seuerall patches and pieces of my Speech

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haue

To the Readers

haue bin put in writing, & disper-
sed into many hands, and some
offred to the Presse. The Kings
M^{ie}. hauing knowledge there-
of, misliked it, & thereupon cō-
manded me to deliuer to him in
writing, the whole discourse of
that which I said in that Cause.

Thus I was put to an vnexpe-
cted new labour, to reuiew my
scribled & brokē papers. Out of
which (according to the charge
imposed vpon me) I gathered all
which I had before spoken, & so
set it downe faithfully & plainly,
and (as neare as I could) in the
same words I yttered it: it pleased
his sacred M^{ie}. to take some view
of it, & taking occasion thereby,

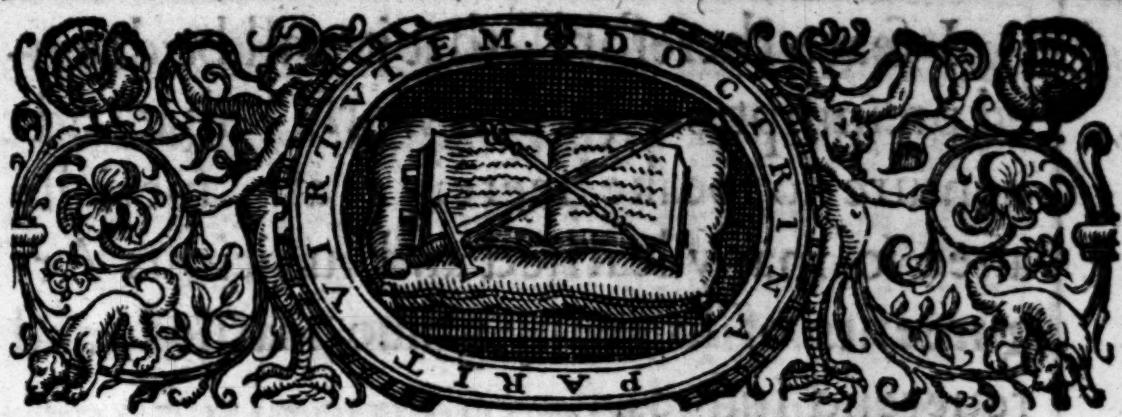
to

To the Readers.

to remember the diligence of the
L. chiefe Iustice of the common
place, for the summary report he
had published of the ludges Ar-
guments, he gaue mee in charge
to cause this to be likevvise put in
Print, to preuent the Printing of
such mistaken and vnperfect
reports of it, as vvere alreadie
scattered abroad.

Whatsoeuer it is, it vvas first
conceiued & spokē out of con-
science & duty; and is now pub-
lished in humble obedience to
my most gracious Soueraigne.
And so I offer and commend it
to your good acceptance and fa-
uourable interpretation.

T. Ellefsmere Canc.



Post-nati.

MY Lords, mine age, mine infirmitie, and indisposition of health, my decaie and weake-nesse of memorie, and *Desuetudo*, and long discontinuance from this maner of Legall exercise (aboue foureteene yeeres) haue bereaved mee of the meanes and helpes that should inhable me to speake in so great a Case.

S. v. &
lib. 7 &
Halvinis. &
poni gis

I feare therefore, that it will be deemed presumption (if not worse) that I aduenture to speake heerein at all; specially after so many learned and iudicious Arguments of so many graue, learned, and reuerend Judges.

To say the same that hath beene saied, must needes be vnpleasaunt, wearisome, and loathsome to the hearers; and not to say the same, is to speake little to the purpose: for, what more can bee saied than hath beene?

Yet, for that the Case is depending in *Chancerie*, and adiourned hither for difficultie in Law, & there I must giue iudgement according to the Law, Whether the Complainant bee inhabbled, by Lawe, to maintaine his suit in that Court, or not: I holde it more fitting to deliuer the reasons of my iudgement heere, where others haue beene heard, than there, before a few, which haue not heard that which hath beene so learnedly argued, and largely debated heere.

And therefore the Case standing thus, I will speake what I thinke : And I must say as one of the graue Judges saied, I can tell no newes ; But some old things which I haue read and obserued, I will remem- ber ; but I can not diuine, or prophesie *de futuris*, I leaue that as Justice Yelverton did.

I am free, and as libertie *Nullius addictus iurare in verba Magistri*, and therefore I will speake ingenuously and freely.

In the arguing of this Case, some things which are of great weight with mee , haue (in mine opinion) beene passed ouer too lightly ; and some other thinges which seeme to me but light, haue beene ouer- weighed, as I thinke.

Halfe an howers time longer or shorter I meane not to striue for , and therefore I will presume on your patience, and assume to my selfe such conuenient time as o- thers haue done : And yet I will husband time as well as I can.

I will not be abashed to strengthen my

weake memory with helpe of some scrib-
led papers, as others haue done : for I ac-
compt it a point of wisedome to followe
wise mens Examples.

Other *Exordium*, *Insinuation*, *Protesta-
tion*, or *Preface* for the Matter it selfe, ei-
ther to prepare attentiuе and beneuolent
auditors, or to stirre offence or mislike a-
gainst either partie, I meane not to vse ; it
is fit for *Oratours*, I neuer professed the
Art, I had neuer skill in it : And it is not
Decorum for *Judges*, that ought to respect
the Matter, and not the humours of the
Hearers.

The *Exordium* the *Ciuilians* vse in their
Sentences I like well ; *In Dei nomine Amen*,
& Deo primituſ inuocato ; other *Exordium* I
care not for.

The Case.

The Case now depending in *Chauncerie*
which is adiourned hither, is thus.

Robert Caluine, sonne and heire apparent
of *James L. Caluine of Colcrosse* in the realme

of Scotland, an Infant of three yeares of age, borne in the saied Realme of Scotland, maketh title by his Bill to a Messuage and Garden with th' appurtenaunces in the parish of Saint Buttolph without Bishops-gate in the citie of *London*: and complaineth against *John Bingley*, and *Richard Griffin*, for detaining the Euidences concerning the same Messuage and Lands, and taking the profits thereof.

The Defendants pleade, that the Plaintiff is an *Alien*, and that in the third yeere of his Maiesties raigne of *England*, and in the nine and thirtieth yere of his Maiesties raigne of *Scotland*, hee was borne in the Realme of *Scotland*, within the ligeance of his said Maiestie, of his Realme of *Scotland*, and out of the ligeance of our soueraigne Lord the King of his Realme of *England*.

And the Defendants say further, That at the time of the birth of the Complainant, and long before, and euer sithence, the saied Kingdome of *Scotland* was, and still is, ruled and gouerned by the proper

Lawes and Statutes of the said Kingdome of *Scotland*, and not by the Lawes and Statutes of this Realme of *England*: And therefore the Defendants demaund iudgement, Whether the Complainant ought to bee answered to his said Bill, or shall be received to prosecute the said suite against the Defendants, being for, and concerning the title of Inheritance, and euidence touching the same.

Heereupon the Complainant hath demurred in Law.

This is the speciall Case now depending in the *Chancerie*; in which, and touching all like Cases in generall, mine opinion is, and since the question was first mooued hath beene, That these *Post-nati* are not *Aliens* to the King, nor to his Kingdome of *England*, but by their Birth-right, are liege subiects to the King; and capable of estates of Inheritance, and freehould of Landes in *England*: and may haue and

maintaine as wel Reall as Personall actions
for the same. And that therefore the now
Complainant *Robert Caluine* ought to bee
answered.

This opinion I did first conceiue vpon
those rules and reasons in Lawe (as well the
Common Law of *England*, as the *Ciuile law*)
which heereafter in the course of my
Speech I will remember. And in this o-
pinion I haue beene since confirmed by
many great and weighty reasons.

First, in the Statute made in the first
yeare of his Maiesties raigne of *England*,
authorizing the Treatie betweene the
Commissioners for both the Kingdomes,
it is said (as Iustice *Warburton* noted well)
That both the famous & ancient Realmes
of *England* and *Scotland*, are now vnted
in allegiance and loyall subiection in his
royall person, to his Maiestie, and his po-
steritie for euer.

Heere wee haue the Judgement of the
Parliament, that there is a Vnitie in allege-

The procee-
ding in the ge-
nerall Case of
Post-nati.
Stat. 1. Jac.
19. Mart. 1603

ance to one Royall person ; And therefore I see not how wee may out of imaginarie conceipts , and by subtile distinctions straine our wittes to frame severall allegances to one and the same Royall person, contrary to so plaine a declaration made by Parliament.

The Procla-
mation,
2. Iacobi 20.
Octobr. 1604.

Next followeth his Maiesties Proclamation 20. Octobris 1604. by which hee assumed to himselfe the Name and Stile of King of great Britaine: In which Proclamation , among many other weighty reasons, this is added for one, *We haue receiued from those that be skilful in the Lawes of the Land, That immediatly vpon our succession, diuerse of our auncient Lawes of this Realme are ipso facto expired ; as namely, that of Escuage, and of the naturalization of the Subiects.* This was not done sodainely, nor lightly ; but vpon graue and serious deliberation, and aduise : And therefore seemeth to mee to be a matter of great importaunce , and not to be lightly regarded.

The same twentieth of October, these Commissioners beganne their Treatie. Of the graue and iudicious Course which they held, in debating of the Matter then propounded, I will forbear to speake: But for this point of Naturalization now in question, their resolution in the end was thus:

That it shall bee propounded to both the Parliaments at the next Sessions, that an Act be made containing a declaration, as followeth: That all the Subiects of both the Realmes, borne since the decease of Elizabeth the late Qu. of *England* of happy memory, and all that shalbe borne hereafter vnder the obedience of his Maiestie, and his royll Progeny, are by the common Lawes of both the Realmes, and shall be for euer, inhablled to obtaine, succeede, inherite, and possesse all *Lands, Goods, and Chattels, &c.* as fully and amply as the Subiects of either Realme: respectiuely might haue done, or may doe in any sort within the Kingdome where they were borne.

The Commissioners authorized by Parliament, did begin 20. Octab. and did continue vntill 6. Decemb. 2. Jacobi.

The resolution of the Cōmissioners.

This, after long debating, and graue and deliberate consideration, was, in the end, the resolution of the greater part of the Commissioners, not one openly gainsaying it. And diuerse of the principall Judges of the Realme were present at all times when the point was debated. And herein I note the wise and iudicious forme of that resolution, which was not to propound to the Parliament the making of a new Lawe, but a declaration of the common Lawes of both the Realmes in this question.

Now, if wee consider who these Commissioners were, what Lords of the higher House, and what persons of the common House, selected of all degrees, most eminent for their learning and iudgement, as well in Ciuile and Common Law, as in knowledge, and experience other waies, beeing assisted by the graue Judges of the Realme: If this, I say, be well considered, then this Resolution must be accompted and esteemed as a matter of

great and weighty importance, and much to be regarded in the deciding of this question.

According to this Act of the Commissioners, the Case was propounded in the next Session of Parliament. In the higher House, the Judges were required to deliver their opinions. There were then eleven Judges present; whereof tenne did with one vniforme consent affirme the Lawe to be, That the *Post-nati* were not Aliens, but naturall Subjects (one onely dissenting.) After this, the Question was debated in a solemne Conference betweene both the Houses of Parliament at severall times, and at great length, and with much libertie: Nothing was omitted that Wit or Art could inuent to obiect against this opinion; And that was done by men of great learning, and singular judgement in the Common Lawe, and Ciuite Lawe; and by some other Gentlemen of the Common House, of rare

The Judges
opinion in
Parliament.

gifts for their learning, knowledge, elocution and experience.

At this Conference the Judges were present ; who , after they had heard all that was , or could be said , did confirme their former opinions , which they had before deliuered in the higher House : Three of the chiese of them declaring their reasons , and all the rest (sauing one alone) concurring in the same . So , here was now a generall resolution by all the Judges of the Realme (one excepted) and that deliuered , not priuately , but in Parliament ; which without more adoe had beene sufficient to haue decided and determined this Question.

The force and
strength of the
Kings proclama-
tions.

There
can not
make
new Law
by Proclama-
tions.

Touching the Proclamation , it was discreetly and modestly saied by a learned Gentleman of the lower House , That it was of great respect , and much to bee regarded ; but yet it was not binding , nor concluding : for , Proclamations can neither make , nor declare Lawes : And be-

sides ,

sides, that this Proclamation was not grounded vpon any resolution of the reuerend Judges; but vpon the opinion of some skilfull in the Lawes of this Land.

Of the strength of Proclamations, being made by the King, by the aduise of his Counsell and Judges, I will not discourse; yet I will admonish those that bee learned and studious in the Lawes, and by their profession are to giue counsell, and to direct themselves, and others, to take heede that they doe not contemne, or lightly regard such Proclamations.

And to induce them thereunto, I desire them to looke vpon, and consider aduisedly these few Proclamations, Prouissons, or Ordinaunces, which I will point out vnto them; and of what validitie and force they haue beene houlden to bee in construction of Lawe, albeit they be neither Statutes, nor Acts of Parliament.

M.4.H.3. in *Dower*, the defendant pleaded, *Quod petens est de potestate Regis Franciae, & residens in Francia; Et prouisum est*

not w^t w^t
of reu^m are
m^m w^t b^t
s^s w^t c^t d^t
'ye w^t a^t b^t

Fitzh. Dower.
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à Conflio Regis, quod nullus de potestate Regis Francie respondeatur in Anglia antequam Angli respondeantur de iure suo in Francia. This the Plaintifes Attorney could not denie; and thereupon the iudgement was, Ideo sine die.

Anno 20 Hen.3. certaine Prouisions and Ordinaunces were made which were called *Prouisiones Merton*, where the King assembled his Archbishops, Bishops, Earles, and Barons for the Coronation of the King, and his wife Queene Elenor ; and the words be, *Prouisum est in curia Dom. Regis apud Merton corā Willihelmo Cantuariensi Archiepiscopo, & Coepiscopis, Suffraganeis suis ; Et coram maiori parte Comitum & Baronum Angliæ ibidem existentium pro Coronatione ipsius Domini Regis & Helionoræ Reginae, pro qua omnes vocati fuerunt : Cum tractatum esset de communi vtilitate Regni super articulis subscriptis. Ita prouisum fuit & concessum, tam a predictis Archiepiscopis, Episcopis, Comitibus, & Baronibus, & alijs. De viduis primò &c.*

Fitzherbert citeth a Prouision made *Anno 19. H.3.* in these words, *Et prouisum fuit coram Domino Rege, Archiepiscopis, Episcopis, Comitibus, & Baronibus, Quod nulla Affisa ultime presentationis de cetero capiatur de Ecclesiis, Præbendatis nec de Præbendis.* This Prouision was alowed and continued for Lawe, vntill *W. 2. Anno 13. Edw. 1. ca. 5.* which prouides the contrary by expresse words.

Anno 6. Ed. 1. the King and his Judges made certaine Explanations of the Statute of Gloucester, which are called, *Explanationes statuti Glocestrie:* And these be the words. *Postmodum per Dominum Regem & Iusticiarios suos factæ sunt quedam Explanationes quorundam articulorum superius posteriorum.* Which Explanations haue euer since beeene receiued as a Law.

There is a Proclamation by King *Ed. 3.* bearing *Teste at Westminster Anno 15. Edw. 3.* And Judge *Thorpes* opinion *Pa. 39. Ed. 3. 7.* both which I will now forbeare to report, and wish the Students to reade the same

Fitzherbert
Nob. Br. 32.

Anno 6. Ed. 1.
Explan. stat.
Gloucest.

A Proclama-
tion. 15. Ed. 3.

in the printed Bookes, where they shall see both the effect, and the reason, and the cause thereof ; They are worth their reading, and may informe and direct them what iudgement to make of Proclamati-
ons.

How the Judges opinion delivered in parliament ought to be regarded.
Object.

Reffons.

Touching the opinion of the Judges, some haue objected (yet modestly, and I suppose, according to their conscience and vnderstanding) That there is not like regarde to be had of Judges opinions giuen in Parliament, as ought to bee of their iudgements in their proper Courts and Seates of Iustice : for, in those places their Oath bindeth them ; but not so in the other.

1. To this I answere : The reuerence, and woorthinesse of the men is such, as is not to bee quarrelled and doubted of, if there were no Oathe at all : For, if men of so great and eminent places feare not God and his iudgements, euен out of a

religi-

religious conscience, which is *Fremum ante peccatum, & flagrum post peccatum*, it may be doubted that the externall ceremonie of adding a Booke will little auaile.

2 Their Oath doth bind them as much in the Court of Parliament, as in their proper Courts: for, that is the supreme Court of all; and they are called thither by the Kings Writ, not to sit as Tell-clockes, or idle hearers; but, *quod personaliter intersitis nobiscum, ac cum ceteris de Consilio nostro super dictis negotijs tractaturi, vestrumq; Consilium impensuri*: And those Negotia be *Ardua & urgentia negotia Regni &c.* And their Oath, amongst other things, is, *That they shall counsell the King truely in his businesse.*

3 This Exception may serue against the Judges, as well in Cases when they sit and giue iudgement, as Iustices of Assises, *Nisi prius, Oyer and Terminer, and Gaole Deliuerie*, as in this Case of Parliament: for, there they haue none other Oath but their generall Oath.

Judges o

4 It becomes vs to esteeme of Judges now, as our forefathers esteemed them in times past ; for , as they succeede them in Time and Place (I thanke God , and the King , I haue neither cause to feare any for displeasure , nor to flatter any for fauour ; wherefore I will neither be afraid , nor abashed to speake what I thinke :) I say therefore, that as our Judges now succeed the former Judges, in Time and Place ; so they succeede them, and are not inferior to them in Wisedome, Learning, Integritie, and all other iudicious and religious Vertues.

Then let vs see what the wisedome of Parliaments in times past attributed to the Judges opinions declared in Parliament ; Of which there bee many Examples ; but I will trouble you but with two or three.

I wil not remember *Richard* the seconds time (of which some of our Chroniclers doe talke idely , and vnderstand little) where power and might of some potent

persons oppressed iustice , and faithfull Judges , for expounding the Law soundly , and truely . The first that I will remember , is this .

In the Parliament 28. H. 6. 16. Ianuarij , the Commons made suite , That W. de la Poole Duke of Suffolke should bee committed to prison for many treasons and other hainous crimes committed by him . The Lordes in Parliament were in doubt what answer to giue ; they demaunded the opinion of the Judges : Their opinion was , That hee ought not to bee committed ; And their reason was , for that the Commons did not charge him with anie particular offence , but with generall slaunders and reports ; And therefore because the Specialties were not shewed , hee was not to bee committed . This opinion was allowed ; And thereupon 28. Ianuarij , the Commons exhibited certaine speciall Articles against him , viz . That hee conspired with the French King to inuade

what he was
when a pri
is charged
that only
wth you all
offenses e
wth he
; hee is not
but now
P^rision

the Realme &c. And thereupon hee was committed to the Tower.

2 In the Parliament *Anno 31. H.6.* in the vacation (the Parliament being continued by prorogation) *Thomas Thorpe* the Speaker was condemned in a thousand pounds dammages in an action of Tres-passe , brought against him by the Duke of *Yorke* , and was committed to prison in Execution for the same . After, when the Parliament was re-assembled, the Commons made suite to the King and the Lords , to haue *Thorpe* the Speaker deliuered , for the good exploite of the Parliament ; whereupon the Duke of *Yorke* s Counsell declared the whole Case at large . The Lords demaunded the opinion of the Judges, whether, in that Case, *Thorpe* ought to bee deliuered out of prison by Priuiledge of Parliament : The Judges made this aunswere , That they ought not to determine the Priuiledge of that high Court of Parliament ; But for

the declaration of proceeding in lower
Coutts, in cases where Writtes of *Super-
sedens* for the priuiledge of the Parliament
be brought vnto them, They aunswered:
That if any person that is a Member of
the Parliament bee arrested in such cases
as bee not for treason or felonie, or for
suretie of Peace, or condemnation had
before the Parliament, it is vsed that such
persons be released; and may make At-
turney, so as they may haue their free-
dome and libertie, freely to intend the
Parliament. Hereupon it was concluded,
That *Thorpe* should still remaine in pri-
son according to the Lawe, Notwithstan-
ding the priuiledge of Parliament, and
that hee was the Speaker. Which resolu-
tion was declared to the Commons by
Walter Moyle, one of the Kings Serieants
at Lawe. And then the Commons were
commaunded in the Kings name, by the
Bishop of *Lincolne* (in the absence of the
Archbishop of *Canterbury* then Chauncel-
lor) to choose another Speaker.

3 In the Parliament An.7.H.8. a Question was moued, Whether spirituall persons might bee conuanted before temporall Judges for criminall causes ; There sir *John Fineux* and the other Judges deliuered their opinion, that they might and ought to bee so. And their opinion was allowed, and maintained by the King and the Lords : And *D.Standish*, who before had houlden the same opinion, was deliuered from the Bishops. And it is worth the noting, what wordes passed in that Case betweene the Archbishop of Canterbury, and that worthy Judge *Fineux*.

Writs of Errour sued in parliament,

4 If a Writ of Errour bee brought in Parliament vpon a Iudgement giuen in the Kings Bench, the Lords of the higher House alone (without the Commons) are to examine the Errours ; But that is by the aduise and Counsell of the Judges, who are to informe them what the Lawe is, and so to direct them in their iudgement. And if the iudgement bee reuersed,

then

then commaundement is to bee giuen to the Lord Chancellour to doe Execution accordingly. And so it was in *Anno 17. R. 2.* in a Writte of Errour brought in Parliament by the Deane and Chapiter of *Lichfield*, against the Prior and Couent of *Newport-Panell*, as appeareth by the Record. But if the iudgement bee affirmed , then the Court of the Kings Bench are to proceede to execution of the Iudgement , as it appeareth in *Flowerdewes Case P. i. H. 7.* fol. 19. But it is to bee noted , that in all such Writtes of Errour , the Lords are to proceede according to the Lawe ; and for their iudgement therein they are informed and guided by the Judges , and doe not follow their owne opinions or discre-
tions otherwise.

This extrauagant Discourse touching Proclamations , and Judges opinions deliuered in Parliament , and how they ought to bee regarded , I haue thought materiall and necessarie , both in respect

of the time wherein wee liue, and the Mat-
ter which we haue in hand : And these bet-
thinges which I thinke haue beene too
lightly passed ouer : But if you condemne
it as impertinent, I must then confesse I
haue presumed too much vpon your pati-
ence; I pray you beare with mee, it is but
my labour lost, and a little time mis-spent,
if it seeme so vnto you : You are wont to
pardon greater faultes ; Call it either a
Passe-time, or *Waſte-time*, as pleaseth
you. Now, to returne to the Case we haue
in hand.

The procesſe
and forme of
proceeding in
the Case of R.
c.now in que-
ſtion.

The generall Question hauing had
this paſſage (by Proclamation, by Com-
mission, and by debating in Parliament)
remaineth yet without cōcluſion or iudg-
ment : And as euerie man abounds in his
owne ſence, ſo euery one is left to his owne
opinion ; ſpecially thoſe that were not
ſatisfied with the graue Resolution of
the Judges in Parliament, which (al-
though ſome may tearing and accompt

as bare opinions) I must alwayes valem, and esteeme as a reall and absolute iudgement. Now, I say, this generall Question is reduced to two particular Cases, and is iudicially depending in two the highest Courts of Iustice in this Realme; and that is by one Complainant against severall Defendants for the freehoulde and inheritance of severall parcells of Land: and (as M. Solicitor said well) is a Case, not fained, nor surmised, but a true Case betweene true parties: And being *Quaestio iuris, non facti*, is by both these Courts adiourned hither to bee decided, and determined by all the Judges of England, as the rarenesse of the Case, and the weight and importaunce of it, both for the present and the future doth require.

And the Case being of this nature and qualtie, it is not amisse to obserue the proceeding in it: for, it is woorth the obseruing, and not to bee forgotten. The Defendants counsell, men of great learning, and in their profession inferiour to

none of their qualitie and degree, men
conuersant and well exercised in the Que-
stion, and such as in the great conference
in parliament, most of them were specially
selected & chose (for so they wel deserued)
as most sufficient, able, and fit, as well for
Learning and Knowledge, as for all other
giftes of Witte and Nature, to handle so
great and rare a Question. And although
it hath pleased them of their good discre-
tion to vise the paines but of a few in the
debating and arguing of the Case at the
Barre: yet no doubt that was done vpon
mature deliberation and conference with
all the residue: And whatsoeuer the Spi-
rites, the Learning, the Wisedome, and
Knowledge of all the others, vpon long
study could afforde, was put into the
mouth of those few to serue as Organs
and Instruments to deliuer it vnto vs;
which they haue so well and sufficiently
performed, that they deserue great praise
and commendation: For, in my poore
opinion, the witte of man could not de-

use to say more touching this Question in Lawe than they haue saied. And whatsoeuer hath beeene sithence spoken for that part, it is for the Matter but the same in substance, which the counsell at the Barre did deliuere; though it hath beeene vari-
ed in forme, and amplified with other wordes and phrases, and furnished with shew of some other strained Cases and au-
thorities. *but bne yllsups has a ylouis bne*

The handling of it by the learned and reuerend Judges, hath beeene such, as it may appeare to the world, that euerie one hath spoken his owne heart and con-
science; and hath laboured by long stud-
die to search out the Lawe and the true rea-
son of the Lawe in this rare Case; and so
they haue spoken, as *Coram Deo & Angelis*:
None, with desire to see me popular; for
nothing ought to bee *tam populare quam*
veritas: None to see me to be Time-servuers,
or Men-pleasers; for the King (whome
vnder God they serue) being Pater patriæ,
and soueraigne head of both these great

it f to the fayre fayre to do the fayre to
go Godis fayre is not me fayre not the fayre
moweth come fayre and fayre Post-nati.

28

w f my ruleth
by the lawe

lawe is by
and off vnitie

vnited Kingdomes, is to them both, like
as the head of a naturall body is to all the
Members of the same, and is not, nor can
not bee partiall more to one than to ano-
ther. Hee deliteth in truth, and desireth
it ; and without truth hee can not bee
pleased. Hee ruleth by his Lawe, and
commaundeth his Judges to minister to
all his Subiects Lawe and Justice sincerely,
and truely ; and equally and indifferent-
ly, without any partiall respect.

It was never seene, but that in all rare
and difficult Cases, there haue beene di-
uersitie of Opinions ; but yet without
breach of Charitie, which is the Bond
of Vnitie. So it hath happened in this
Case. The Case hath beene argued at
large by foureteene learned Judges ;
twelue of them haue concurred in iudg-
ment, but vpon severall reasons : for, as
many wayes may leade to one end of the
journey ; so diuerse and severall reasons
may conduce to dñe true and certaine
conclusion.

beling

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And

And here I may not omit the woorthic memorie of the late graue and reverend Judge, Sir John Popham, chiefe Iustice of the Kings Bench deceased (a man of great wisedome, and of singular learning and iudgement in the Lawe) who was absolutely of the same opinion, as he often declared, as well in open Parliament, as otherwise.

The Apostle Thomas doubted of the Resurrection of our Sauiour Iesus Christ, when all the rest of the Apostles did firmly beleue it : But that his doubting confirmed, in the whole Church, the Faith of the Resurrection.

The two worthy and learned Judges that haue doubted in this Case, as they beare his Name, so I doubt not but their doubting hath giuen occasion to cleare the doubt in others ; and so to confirme in both the Kingdomes, both for the Present and the Future, the truth of the iudgement in this Case.

Thus, my Lords, haue you hitherto nothing from mee but *Amen*, to that which all the Judges (sauing two) haue saied ; and much more you cannot expect from mee : Yet, since I must give iudgement in this Case ; and I saied in the beginning, that I would render the reasons of my iudgement : (for that is the course of argument I must houlde) I will now deliuer unto you, what are the speciall and principall reasons that first haue induced mee, and still moue mee to houlde the opinion that I doe : And as I goe, I will indeuour to cleere some doubts and questions, that partly in the conference in Parliament, and partly otherwise, I haue heard made ; not onely touching this Case it selfe, but also touching the forme and manner how it is to be decided and iudged.

How this Case
is to be iud-
ged, and by
what Law.

the Statute law
is a position
law.

positionis compounding, position
i. object is of its foliis

The Case is rare, and new (as it hath beeue often saied) it was neuer decided *Terminis terminantibus* ; It was neuer iudged by any Statute Lawe, which is a po-

litiue

sitive Lawe ; nor by judgement of the Judges of the common Lawe.

Now , the first Question is (as some would haue it) How it is to be iudged, and by what Lawe ; and haue wished that it might haue stayed vntill the Parliament , and so bee decided by Parliament. They that make this doubt, I will let them demurre , and die in their doubts : For, the Case beeing adiourned hither before all the Judges of *England*, is now to be iudged by them according to the common Lawe of *England* ; and not tarrie for a Parliament : For, it is no transcendent Question, but that the common Lawe can and ought to rule it, and ouer-rule it, as Justice *Williams* said well.

But then this Question produceth another ; That is, What is the Common Lawe of England ; Whether it be Ius scriptum, or nonscriptum ; and such other like nicetie s : For, wee haue in this Age so many Questionists ; and Quo modo and Quare, are so common in most mens

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mouthes, that they leauue neither Religion, nor Lawe, nor King nor Counsell, nor Policie, nor Gouernment out of question.

And the end they haue in this Question, What is the Common Lawe? is to shake and weaken the ground and principles of all gouernement: And in this particular Question of the Law of *England*, to ouerthrow that Law whereby this Realme hath many hundred yeares beeene gouerned in all honour and happiness: or at least to cast an aspersion vpon it, as though it were weake and vncertaine. I will therefore declare mine opinion in this point plainly and confidently, as I thinke in my conscience, and as I finde to be sufficiently warranted by ancient Writers, and good authorities voide of all exception.

The ground
of the Com-
mon Law.

new
the Law
of God

The common Law of *England* is grounded vpon the Law of God, and extenes it selfe to the originall Lawe of Nature, and the vniuersall Lawe of Nations.

When

When it respects the Church, it is called *Lex Ecclesiæ Anglicane*, as *Magna Charta* ca. 1. *Ecclesia Anglicana habeat omnia sua iura integra & illæsa*.

When it respects the Crowne, and the King, it is sometimes called *Lex Coronæ*, as in *Stat. 25. Edw. 3. cap. 1. Lex Coronæ Angliæ est & semper fuit &c.* And it is sometimes called *Lex Regia*, as in *Registro fo 61. Ad iura Regia spectat: And, Ad conservationem iurium Coronæ nostra, & ad iura Regia ne depereant &c.*

When it respects the common subjects, it is called, *Lex Terræ*; as in *Magna Charta* ca. 29. *Nisi per legale iudicium parium, vel per legem Terræ.*

Yet, in all these Cases, whether it respects the Church, the Crowne, or the Subjects, it is comprehended vnder this generall tearme; The common Lawes of England: Which although they bee for a great parte thereof reduced into writing; yet they are not originally *Leges scriptæ*.

This I first learned of the late Lord Treas-

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The common
Law is not o-
riginally *Leges
scriptæ*. but
for we
most of
it is our
diverdule
writing
and in
600 p

Sum
law

note

surer Burleigh (whose Honourable memorie England can neuer forget) and hearing it from him, I indeuored by my priuate studie to satisfie my selfe thorowlie in it. And, whosoever shall well consider the Lawes of *England*, which were before the Conquest (whereof wee haue some Remnants and Patches) or since the Conquest vntill *Magna Charta, Anno 9. H.3.* will make little doubt of it.

In *H.2.* time *Glanuile* writeth thus; *Leges Anglicanas licet non scriptas, leges appellari non videtur absurdum.*

And in *Hen. 3.* time *Bracton* writeth thus; *Cum autem ferè in omnibus Regionibus vtantur legibus & iure scripto, sola Anglia vsa est in suis finibus iure non scripto & consuetudine; in ea quidem, ex non scripto Ius venit quod usus comprobauit.*

But I may not agree with *Bracton*, that *Sola Anglia vsa est iure non scripto.* For I find that the grauest, and the greatest learned Writers of the *Ciuile Lawe*, both auncient

and of this our time, doe hould the same opinion, touching the Ciuite Lawe it selfe, for thus they write : *Ex non scripto Ius venit quod usus approbavit.* And thus; *Ius Ciuite dictum ex non scripto natum est.* And; *Ius non scriptum dicitur Consuetudo, non quod scripto perpetuo careat, hoc enim falsum est.* Nam & Consuetudines in memoriam constatiorem reducuntur in Scripturam, ut cetera quoq; quae sine scriptura perficiuntur : Sed non scriptum ius est : id est, quod à scriptura vis eius non coepit nec pendeat. So hereby it may appeare how in this wee concurre with the Ciuite Lawe.

But hereupon these Questionists moue an other Question, viz. If the common Lawe be not written, howthen shall it be knownen?

To this I aunswere; It is the common custome of the Realme (as Bracton saith, *Ius venit quod usus comprobavit :*) And it

hoc non est
usus

How the common Law of England may be knowne.
Obiect.

Repons.

3

standeth vpon two maine pillers & principall parts, by which it is to bee learned and knownen.

Maximes and
Principles.

The first is, certaine knowne principles and Maximes, and ancieut Customes, against which there neuer hath beene, nor ought to bee any dispute. As in Cases of Subjects ; an estate in Fee-simple, for life, for yeeres, Dower, Curtesie &c.

In Cases of the Crowne, the Female to inherite : the Eldest sole to bee preferred : No respect of Halfe Blood : No tenant in Dower, or by the Courtesie of the Crowne : No disabilitie of the Kings person by infancie &c.

Responsa pru-
dentum.

The second is, where there be no such Principles, then, former iudgements giuen in like Cases : And these be but *Arbitria Iudicium*, & *Responsa Prudentum*, received, allowed, and put in practise and execution by the Kings authoritie.

Of these Bracton speaketh ; *Ego H. de Bracton animum erexi ad vetera Iudicia iustorum perscrutanda ; facta ipsorum, Consilia, & Responsa in unam summam redigendo compilaui.*

And before the Conquest, King Ethelbert caused a Booke to bee made, which was called *Decreta Iudiciorum* : And king Alured did the like, as master Lambard a iudicious and learned obseruer of Antiquities, doth remember.

Of these also the Judges speake H.33. H.6. Moyle, fo.8. *We rule the Law according to the auncient course.* Ashton, fol.9. *All our Lawe is guided by Use, and by Statute.* And Prysot saith, fol.9. *There cannot be a positiu Law, but such as was iudged or made by Statute.* Wherein I note also that hee equalleth a Iudgement with a Statute.

In 36. H.6. fol. 25. Fortescue reasoneth thus ; *The Lawe is as I haue said, and so bath beeene alwais since the Lawe beganne.*

In 37. H.6. f.22. Ascue reasons thus ; *Such a Charter bath bin allowable in the time of our*

Lambard in explicatione verbi Hyde.

all the vo
lume is in
By 2/3 c. 2/1

Predecessours, which were as sage and learned as we be.

In H.4.Edw. 4. fol. 41. Markham reasoneth thus; *It is good for vs to doe as it hath bin vsed before this time, and not to keepe one way one day for one party, and another day the contrary for the other party: And so the former Precedents be sufficient for vs to follow: And judgement was giuen accordingly.*

Anno 36.H.6.

And in the former Case 36.H.6. Forescue saith further; *Wee haue many Courses and Formes which be houlden for Lawe.*

Also euerie one of these foure principall Courts, The Chauncery, Kings Bench, Common-plees, and Eschequer, haue in many things seuerall courses and formes which are obserued for Law, and that not onely in that proper Court, but also in all Courses through the Realme; whereof many Examples bee remembred in the Case of the Mynes in *Plowdens Commentaries.*

*In noncasu no-
num remedium.*

The third: But if there be no such for-

mer Judgements, nor direct Examples or Precedents, then this Rule hath a further extention, which is this.

There is a Rule in the common Lawe, that *in novo casu nouum remedium est apponendum*. Et concordent Clerici de Breue faciendo, ita quod nullus recedat à Cancellaria sine remedio. For the Chācery is properly Officina Iustitiae & AEquitatis; where all original writs (which in ancient times were the Grounds of all Suites) are deuised and framed. And these Clerici were graue and auncient men; skilfull, & long experienced in the course of the Chancerie; and called *Clerici de prima forma*. And of late time *Magistri Cancellariae*; who in new and strange cases, besides their owne knowledge and experience, had oftentimes conference with the graue Judges for the deuising and framing of new Writtes when neede required. And this I take to bee the same which is in the Statute *W.2. cap.24.* *Et quotiescumq[ue] de cætero euenerit in Cancellaria, quod in uno casu*

et auctoritate
officinae Justi
& equitatis

St. W.2. cap.24.
Anno 13. Ed. 1.

reperitur breue, & in consimili casu, cadete sub eodem iure & simili indigente remedio, non reperitur, Concordent Clerici de Cancellaria in breui faciendo, vel attermineant querentes in proximum Parliamentum: Et scribantur casus in quibus concordare non possunt, & referant eos ad proximum parliamentum: Et de consensu Iurisperitorum fiat Breue, ne contingat de cetero, quod Curia Regis deficiat conuentibus in Iusticia perquirenda.

Wherein I note these three thinges: First, The Clerkes are to agree; and if they agree, that is an end, and standes for Lawe, and then no referrement to the Parliament. Second, If the Clerks agree not, and so the Case be referred to the Parliament; Then De Consensu Iurisperitorum fiat Breue: So Consensus Iurisperitorum is the Rule, and not the multitude of vulgar opinions. The third is, That Iustice faile not them which complaine: Which will often faile, if you stay vntill a Parliament. For Parliaments are not to be called for the wrong of a few priuate Subjects: but for

hinc placitum
et taliter

the great and vrgent affaires of the King
and the Realme.

I finde also a like Rule in the Ciuite
Lawe; *Vbi non est directa lex standum est ar-
bitrio Iudicis, vel producendum ad similia.* And
another saith, *De similibus ad similia iudici-
um & argumentatio recipiuntur.*

*Vbi non est di-
recta Lex &c.*

4 Besides these, there is an other
generall and certaine Rule in the Ciuite
Lawe, which I referte to the last parte of
that which I meane to speake in this Mat-
ter.

*Rex solus iudi-
cat, &c.*

So, leauing that vnto a more proper
place, I will herelupon conclude, That
if there bee no former Judgements, nor
Examples, nor Precedents to bee found,
then *Concordia Clericorum, & Arbitrium Iu-
dicum* is to seeke out the true and solide
reason; and thereupon to ground their
Judgements in all new Cases: For it was
truely saide by a learned Gentleman of the
Lower House, *Deficiente lege recurrendum est
ad consuetudinem: Deficiente consuetudine re-*

currendum ad rationem. And so from the Judges we shall haue *Responsa prudentum* to decide all such new Cases and Questions. And according to this Rule, all such new doubts and questions haue beene resolved and decided by the graue Judges in former times.

A request to
the professors
of the Ciuite
Lawe.

the Ciuite Lawe
is but ancient.
and on all in
many parts
of the world
it reareth
in the common
lawe in many
things though
they differ much
in forme

But here, before I proceede further, I am to make a suite, which is this: To That whatsoeuer I haue spoken, or shall happen to speake of the Ciuite Lawe; or whatsoeuer I shall cite out of any Writer of that Lawe, I pray fauour my Master's that professeth it. q. I acknowledge that Lawe to be auncient and generall in many parts of the world; and I reuerence the professors of it, as men of great learning, wisedome, and iudgement. I professeth it not; I haue learned little of it; but in that little I haue found that in the reall and essentiall partes of Justice, the Ciuite and common Lawe doe in many things concurre, though they differ much in the forme

forme and manner of proceeding. And that which I shall haue occasion to produce of that Lawe, will bee to shew how the common Law and Ciuile doe agree in one reason and iudgement in those things which I shall speake of.

Yet I must take libertie to say, That neither in *Spaine*, nor in *France* (those two great Monarchies) it is not generally received nor allowed as a concluding and binding Law.

They take there the reasom of it onelie as a directiō to their proceeding & iudgement: But to produce or alledge it as a concluding or binding Law, was no lesse than *Capitis pæna*.

This I make not of my selfe; for, besides common practise and experience, I haue an honest and substantiall witnesse, Master *Adam Blacwood* a Scottishman, a man of singular learning in the Ciuile Lawe, who defendeth in like manner the Lawes of *Scotland*, as appeareth in his learned Booke intituled, *Pro Regibus Apo-*

*But the S
lawe is not
alway true. in
new wth Affair*

Blacwood ca. 10

logia, written by him against a seditious Dialogue or Libell made by George Buchanan, *De iure regni apud Scotos*, where he tells him, *Aliud Sceptrum, aliud Plectrum*. But it is not amisse to recite his owne words, which are thus; *Philippus cognomento Putcher, cum Lutetiae supreme iurisdictionis curiam institueret, eam Romano iure solutam esse declaravit in eamq; sententiam vetus extat eius Curia decreta, ne causarum patroni Romanarum Legum auctoritatem patriæ legibus opponant. Sed cum ille bono & equo niti videntur & probabilem utilitatis publicæ causam continere, nos earum utimur haud imperio, sed ratione cum omnes homines naturæ praescripto subiiciuntur. Quin et si quid aduersus rationem legum Romanarum perperam ac temerè iudicatum est, id earum multis poenis haud aestimatur, sed vel Principis, vel superioris magistratus arbitratu. Nam cum in publici muneri partem admittimur, & conceptis verbis inauguramur, solemnis sacramento regiarum & municipalium legum atq; morum obseruationem, nulla Romani iuris mentione, spondemus. Apud Hispanos*

capitis pñnam ijs indictam legimus qui Romanarum legum auctoritatem vel in foro laudarent, vel in puluere scholastico proficerentur. Sed si quid occurreret patrijs legibus ac moribus indefinitum quod iudicanti religionem adferret, vnicum erat eximendo scrupulo regis consulendi remedium. Alarius Tolosæ regnans, idem Gothis imperavit, vt si quis aduersus ipsum leges, Ciuale Romanorum ius citaret, temere factum morte lueretur.

Now to returne to that which I haue touched before, I say, that when there is no direct Lawe, nor precise Example, we must Recurrere ad rationē, & ad responsa prudentum. For, although *Quod non lego, non credo*, may bee a true and certaine rule in Diuinitie; yet for interpretation of Lawes, it is not alwayes so: For wee must distinguish betweene *fidem moralem*, and *fidem diuinam*, or else wee shall confound many things in the ciuile and politike gouernement of Kingdomes and States. For, the first Precedent which wee haue now, had no precedent when it began; But as *Taci-*

Recurrēd, ad
Rationē, &c.

*Quod non lego
non credo. nō tñnt
dib. in hypo*

*notabili
renuntiatio*

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Recurrēd. ad
Rationē. &c.

*Quod non lego
non credo. ut dicitur
Igitur in lego
non doceat
et in iustitia*

tus saith, *Quia nunc vetustissima creduntur noua fuerunt, & quod hodie exemplis tuemur, inter exempla futurum est.* And to those that hould, that nothing is to bee done but by former Examples, *Horace speaketh thus; O imitatores seruum pecus:* And Cicero saith, *Non exempla maiorum querenda, sed consilium est eorum à quibus exempla nata sunt explicandum.*

Thus hath Iustice beene duely administered in England, and thereby the Kings haue ruled, the people haue beene gouerned, and the Kingdome hath flourished for many hundred yeeres; and then no such busie Questionists moued any quarrell against it.

Thus haue all doubts growing vpon *Magna Charta*, and *Charta de Foresta*, made in King Henry the thirds time, and vpon the Statutes of *Westmin.1.* *Westm.2.* *Westm.3.* and many other Statutes made in *Ed.1.* time: And vpon *Prærogatiua Regis*, and many other Statutes made in *Ed.2.* time, beeene from time to time ex-

pounded; and so of later times, the Statutes of Fines, of Vses, of Willes, and many more.

Thus also haue all Doubts and Cases, whereof there was no Statute or Positiue Lawe, beeene alwaies expounded: for such are most of the cases which wee haue in our Yeere Bookes, and Bookes of Reports, which are in effect nothing but *Responsa prudentum*, as Iustice Crooke did truly say.

Upon this reason it is, that some lawes, as well Statute Lawe, as common Law, are obsolete and worne out of use: for all humane lawes are but Leges temporis: And the wisedome of the Judges found them to bee vnmeete for the time they liued in, although very good and necessarie for the time wherein they were made. And therefore it is saide, Leges humanae nascuntur, vi-
gent, & moriuntur, & habent ortum, statum,
& occasum.

By this Rule also, and vpon this reason it is, that oftentimes auncient Lawes are

Exposition
of Lawes.

Lawes ob-
solete. *Leges
humanae
nascuntur
moriuntur
habent ortum
statum
& occasum.*

nota.

Lawes chan-
ged.

changed

changed by interpretation of the Judges, as well in Cases criminall as ciuile.

In criminall cases the Law was Voluntas reputabitur pro facto; but it is not so now, sauing in treason onely.

In an appeale of Maime Britton fol. 48. saith, Soit le Judgement, que il perde autiel member, come il auer tolle a le plaintife; but it is not so now.

In auncient time, one present, aiding, comforting, and assisting to a murder, was taken to bee no principall, but an accessorie, as it appeareth M.40. Edw.3. fol. 42. & 40. li. Ass. p.8. & p.25. But now in that case hee is iudged a principall. And so it was ruled by all the Iustices M.4. H.7. 18. and so Plowden affirmeth the Lawe to be, in his Commentaries fol. 99. & 100.

In ciuile causes in auncient time, the Lawe was houlden, That hee in Remainder in Taile could not haue an action of Waste, nor bee received vpon default of tenant for life: But afterwards, the Lawe was often iudged otherwise; and so is

the common experience and practise at this day.

In Anno 40. Ed. 3.28. *Fynchden*, chiefe Justice of the common place, saith, that in ancient time the Vicar could not haue an Action against the Parson ; But hee saith the contrarie is vsed at this day, which is the better.

In ancient time a Disseisee could not enter vpon the seoffee of the Disseisor, for sauing of the warranty ; but for many yeeres the Lawe hath beene houlden otherwise, and so the common practise yet remaineth.

By this Rule it is also, that words are taken and construed, sometimes by Extension; sometimes by Restriction; sometimes by Implication; sometimes a Disiunctiue for a Copulatiue ; a Copulatiue for a Disiunctiue ; the present tense for the future; the future for the present ; sometimes by equity out of the reach of the wordes ; sometime words take in a contrary sence ; sometime figuratiuely, as *Continens pro con-*

Construction
of words.

tento, and many other like : And of all these, examples be infinite, as well in the ciuile lawe as common lawe:

Judges con-
sulted with
the priuie
Counsell.

39.E.3 li. A.C.
P.1.

And oftentimes the reuerend Judges haue had a graue regarde in their proceeding, that before they would resolute, or giue iudgement in such new Cases, they desired to consult with the Kings priuie Counsell ; as appeareth in diuerse Cases in King *Edward* the third his time.

R. VV. assaulted *Adam Brabson* in presence of the Iustices of Assise at *Winchester*, for which *A. B.* complained by Bill before the said Iustices, alledging this offence to bee in despite of the King and his Iustices, to his dammage of an hundred pounds. *R. VV.* pleaded, Not guiltie ; and was found guiltie, and damages taxed to tenne pounds. Thereupon the Judges awarded him to prison in the Sherifes keeping. And for the Fine, and that which should be further done for the King ; for the assault done in the presence of the Judges, they would haue the ad-

uise of the Kings Counsell: For in a like case, because R. C. did strike a Iurour at *Westminster*, which passed in an Enquest against one of his friends; It was adiudged by all the Counsell, that his right hand should be cut off; and his lands and goods forfeited to the King. These be the words in the Booke.

M. 19. Ed. 3.
Judgement 174

In this case I note three things.

1. The Judges consulted with the Counsell.

2. They haue a like case before when the Counsell was also consulted with, *viz. Anno 19. Edw. 3.* and yet they would not proceede in this case before they had againe consulted with the Counsell.

3. That before *Anno 19. Edw. 3.* there was no like case nor precedent for such a Judgement; And therefore the Judges would not of themselues pronounce that heauy iudgement before they had conferred with the Counsell touching the same. And after they had the opinion

and aduise of the Kings Counsell, they proceeded to that Iudgement.

M. 39. Ed. 3. 35

Thomas Vghtred Knight brought a Forme=done against a poore man and his wife ; They came and yeelded to the De-maundant, which seemed suspitious to the Court : whereupon they examined the Matter , and staied Iudgement , because it was suspitious . And Thorpe saide, that in the like Case of Giles Blacket it was spoken of in Parliament : And wee were commaunded , that when any like Case should come, we should not go to iudgement without good aduise . Wherefore sue to the Counsell, and as they will haue vs to doe , wee will ; and otherwise not, in this Case.

M. 40. Ed. 3. 34

note

Greene and Thorpe were sent by the Judges to the Kings Counsel (where there were 24. Bishops and Earles) to demand of them, whether by the Statute 14. Ed. 3. ca. 6. a word may be amended in a Writ,

aswel as a letter or a sillable: for, the statute speakes but of a letter or a sillable; & it was answered, That it may well be amended: For, there cannot be a Word without a Sillable; and that it was a nice question of so sage men.

Thus Arbitria Iudicium, and Responsa prudentum haue beene receiued, allowed, and reuerenced in all times as Positiue Lawe; and so it must be still; For, otherwise much mischiefe and great inconuenience will ensue: for new Cases happen euery day: No lawe euer was, or euer can be made that can prouide remedie for all future cases; or comprehend all circumstan-
ces of humane actions which Judges are to determine: Therfore, when such hap-
pen, and complaint is made; what shall Judges doe? Shall they giue no remedie to the partie grieued? Shall they stay for a Parliament? *Interim patitur iustus*. They must therefore follow Dictamen rationis; and so giue speedie iustice. And in ma-

dicta sententia
et Responsa pru-
dentum per le-

dicta sententia
et Responsa pru-
dentum per le-

Judges to be
directed by
reason and
discretion.

ly matters of materiall circumstaunes they must guide themselues by discretion.

As in iudging vpon Presumptions; To discerne which be *Presumptiones temerariae*, which *Probabiles*, which *violentæ*.

So for Time; what is a conuenient Time, and what not.

So for Waste; what is Waste punishable, and what not.

So for Tenders of money; what is a conuenient place for tender of mony, and what not: and what is a lawfull Tender, and what not.

So for Disparagement; what is a disparagement, and what not: And so of other the like cases, which are infinite.

Object.
That the common Lawe is vncerten.

If it be said (for so some haue said) That if this be thus, then the common Lawe of *England* is vncerten; and so the rule of Iustice, by which the people are gouerned, is too pliable, and too weake, and vncerten.

By the ſame reaſon it may be ſaid, That all the Lawes of all Nations are vncerteren : For, in the Ciuile Lawe, which is taken to be the moſt vniuersall and generall Lawe in the world, they hould the ſame rule and order in all caſes which be out of the direct words of the Lawe ; and ſuch caſes be infinite : For, as I ſaide, new caſes ſpring euery day as malice and fraude increaſeth. And ſince the Roman Empire beganne, moſt of their Lawes bee either *Edicta Principum*, or *Arbitria Iudicium*, or *Reſponſa prudentum*. And in their Iudgements they are guided by Arrests and former Iudgements, as may appeare in the Books of many that haue collected ſuch Arrests. And they attribute ſo muſch to ſuch former Iudgements, That as *Pryſot* equalleth them to a Positiue Lawe, ſo they hould, that *Sententia facit Ius, & res iudicata pro veritate accipitur, & legis interpretatio legis vim obtinet.*

Nay (which is more vncerteren) ſometimes they relie vpon Doctours opinions

deliuered in their Prelections and Treatises. And when they finde them varying, and differing one from another (as sometimes they doe) then they preferre that which is *Communior opinio*: And so in good reason they may: For, *Pluralitas idem sentientium, semper superat; quia facilius inuenitur quod à pluribus quæritur.*

But to conclude this point, I would aske of these Nouelists, what they would haue done in *Sibill Belknappes* case; if they had liued in *Henry the fourths* time?

Judge Belknappe.
M. 2 H. 4. 7.
Sir Robert Belknappe, that reuerend and learned Judge, of whome sundrie noble and worthy persons, and some now of great & eminent place in *England* are descended, was banished out of the Realme, (*Relegatus in vasconiam*,) not for any desert or offence of his, but by the might of his potent enemies, and malice of the time. The Lady his wife continued in *England*; she was wronged; she brought a Writ in her owne Name alone, not naming her Husband. Exception was taken against

it, because her husband was liuing; and it was adiudged good, and shee recouered: and the Judge Markebam said;

*Ecce modo mirū quod fœmina fert breue regis,
Non nominando virum coniunctū robore legis.*

Here was a rare and a new case, yet it was not deferred vntill a Parliament: it was iudged, and her wrong was righted by the common Law of *England*, and that *Ex arbitrio Iudicium, & ex responsis prudentium*; and yet it was counted *Mirum* with an *Ecce.*

Now to apply this to *R. Caluines* case: his case is rare and new, so was that: There is no direct Law for him in precise and expresse tearmes: There was never iudgement before touching any borne in *Scotland*, since King *James* beganne his happie raigne in *England*: Hee is the first that is brought in question: So there was no direct Lawe for *Sibill Belknap* to sue in her owne name without her husband, who

was then liuing: hay rather there was direct Lawe against it; yet by the Lawe of England shee had iudgement to recover with an *Ecce modo mirum*: So by the lawe of England iudgement ought to bee giuen for Robert Caluine, but not with an *Ecce modo mirum*; but vpon strong Arguments deduced à similibus, and ex dictamine rationis.

But before I come to those arguments, I wil vse a few words more touching some Rules which I haue read for the interpretation of lawes.

There is a graue and learned Writer in the Ciuile Lawe that setteth downe fourt waies & formes of interpretation of lawes: that is, first, *Interpretatio historica*; secondly, *Etymological*; thirdly, *Analogica*; fourthly, *Practica*.

In the Argument of this Case all these formes haue beeene vsed, and largely handled: and the two first be those that seeme but light to me, and therefore in mine o-

note
Note four
formes of in-
terpretation
of Lawes.

pinion

pinion haue beeene too much stooode vpon,
and ouer-weighed.

For the Historicall interpretation, it
is alwaies darke, obscure, and vncerten, of
what kingdome, countrey, or place soeuer
you speake; I doe alwaies and ouely ex-
cept the diuine Histories written in the
Bible.

Liuy saith, *In tanta rerum vetustate multi
temporis errores implicantur.*

Saint Augustine speaking of the suppo-
sed Bookes of Henoch saith, *Libri isti ob-
nimiam antiquitatem reijciuntur.*

Wherefore, for this parte let this suf-
fice, whether in the beginning there were
one or seuerall Kingdomes in great Bri-
taine; or one or seuerall Monarchs and
Kings of these two great & famous King-
domes in great Britaine. The King our So-
ueraigne is lawfully and lineally descen-
ded of the first great Monarchs and Kings
of both the Kingdomes; and that by so
long a continued line of lawfull descent, as

Historica.

hæwth.

*Fergus.
Inas.*

therein he exceedeth all the Kings that the world now knoweth ; and therefore to inquire further of Historicall knowledge in this Case, I hould it needelesse.

Etymologica

For the Etymological interpretation, there hath beene very much saied, euena as much as Wit and Art could devise: There haue beene alleadged manie Definitions, Descriptions, Distinctions, Differences, Diuisions, Subdiuisions, Allusion of wordes, Extension of wordes, Construction of words ; and nothing left ynscarched to finde what is *Ligeantia*, *Allegiantia*, *Fides*, *Obedientia*, *Subiectio*, *Subditi* ; And who bee *Aborigines*, *Indigena*, *Alienigena*, *Aduenticij*, *Denizati*, &c. And much of this hath beene drawne out of some Writers of the Ciuile Lawe; amongst whome the Etymological interpretation of the words *Ligeus*, and *Ligeantia*, is as vncerten and doubtfull, as it is with our common Lawyers ; And so vpon any of these there cannot be any certen Rule found for Iud-

ges to iudge by, especially in new and rare
Cases.

As for Definition, *Vlpian* teacheth vs,
Omnis definitio in iure Ciuili est periculosa: and
it is said, that *Definitio est duplex*: *Propria*,
que constat ex genere, & differentia: *Impropria*, *que & descriptio vocatur, & est qualibet rei designatio*: So Definition and Description are often confounded, and both
vncerten. Then, since both be vncerten and
dangerous, I will leaue both, and seeke a
more certen Rule to iudge by.

As for Etymologie of words, I agree
with him which saieth, It is *Leuis & fal-*
lax, & plerumque ridicula. It is a Pedant
Grammarians fault. *Marcus Varro* and
others haue beeene noted for it. And
if you examine the Examples which
some doe bring, you will perceiue how
ridiculous and vaine it is. So this Rule
will not serue to finde out that which
wee seeke for: These bee but *Tendicula*
verborum, & Aucupationes syllabarum as one
calleth them: It may haue some vse, and

Definitio
Definition

serue a turne in Schooles, but it is too light
for iudgements in Lawe, and for the seales
of Iustice.

Aquinas setteth downe a more certen
Rule, *In vocibus videndum, non tam à quo,*
quam ad quid sumantur. And words should
be taken *Sensu currenti:* for Use & Custome
is the best Expositor both of Lawes and
Wordes, *Quem penes arbitrium & ius est*
norma loquendi.

Wherefore, of the many and diuerse
distinctions, diuisions, and subdiuisions,
that haue beene made in this Case, I will
say no more but, *Confusum est quicquid in*
puluerem sectum est: and will conclude with
Bishop Iuel; *A man may wander and misse his*
way in Mistes of Distinctions.

Ligeantia sensu
currenti est vin-
culum fidei &c.

Then leauing these Historicall and E-
tymologicall interpretations, and these
curious and subtile Distinctions and Di-
uisions, I say, Ligeantia, or Allegiantia vnder-
stood Sensu currenti, is vinculum fidei & ob-
bedientiae, as Iustice Daniel said well. And

hee that is borne in any of the Kings Dominions , and vnder the Kings obedience, is the Kings liege subiect , and borne *Ad fidem Regis* (for that is the proper and ancient word which the lawe of *England* hath vsed ; *Ad fidem Regis Anglie*, *Ad fidem Regis Francie*) and therefore hee cannot bee a Stranger or *Alien* to the King , or in any of his Kingdomes ; and by consequence , is inhabited to haue lands in *England* , and to sue, and be sued in any Reall action for the same.

And *Ligeantia* hath sometimes a more large Extension : For , hee that is an *Alien* borne out of the kings Dominions , vnder the obedience of another king , if hee dwell in *England* , and be protected by the king and his Lawes , hee oweth to the king the duetie of *Allegeance* ; and so hee is *Ligatus Regi* , and *Ligens Regis* : and if hee commit treason , the Indictment shall bee *contra ligeantia sue debitum*, as it was in *Shirley* the French-mans Case : yet is hee not the Kings subiect : for , hee was not borne

Analogica.

Ad fidem Regis ; But, this is not that Ligeance which wee must finde : For, in a true and lawfull subiect, there must bee *Subiectio, fides, & obedientia* ; and those cannot bee seuered, no more than true Faith and Charitie in a true Christian. And hee that hath these three *à natuuitate*, is *Ligeus Regis*, and can not bee a Stranger or *Alien* to the King, or in his Kingdomes. And that it is so, may be proued by the Rule of the other two interpretations of Lawe ; That is, *Analogica, & Practica*.

King James hath now the Kingdomes of *England, Scotland, and Ireland*, and the Isles of *Gernsey, and Jersey* by dissent ; all these bee his Dominions, and vnder his subiection and obedience.

King Henry the second had *England* and *Normandy* by dissent, from his mother *Mawd the Empresse*; and *Aniow, and Maim* by dissent from his father *Geffery Plantagenet*; and *Ireland* by conquest.

Henry the third had *England* and *Ireland*

by

by descent from his Grand-father *Henry the second* : and *Aquitany* by descent from his Grand-mother *Queene Elenor* wife to King *Henry the second*, and daughter to the duke of *Aquitany*.

Edward the first had all the same by descent ; and parte of *Scotland* by Conquest.

Edward the second, and *Edward the third* had all the same by descent also : and besides, *Edward the third* claimed all *France* by descent from his mother *Queene Isabell*, and had the most part of it in possession ; and so had *Henry the fist* and *Henry the sixt* also.

Now if in these kings times, subiectes borne in those Countries, being then vnder their obedience, vvere no *Aliens*, but capable of landes in *England* : And if at this time subiects borne in *Irelād*, or *Gernsey*, and *Jersey* be no *Aliens*, but capable of lands in *England*; then, by an Analogicall interpretation, why should not subiectes borne in *Scotland* be at this time in like de-

gree? For, in proportion, and in likenesse, and conueniencie, there can bee no difference at all.

But whether the subiects borne in those Countries in the time of those kings were then capable of lands in *England* as naturall subiects; or were deemed *Aliens*, is the Question: and therein Interpretatio practica is to bee considered; and so the Case is brought to be examined per similia. And in Diuinitie Praxis sanctorum est interpretatio praeceptorum.

Now then the Question is, Whether the kings Subiects of *England* and *Scotland*, that be *Post-nati*, may be resembled to the King: subiects of *Ireland*, and the Isles of *Gernesey*, &c. as now they bee: and to the subiectes of *Normandie*, *Aniow*, and *Gascoyne*, and parte of *Scotland* in former times, when the same were the Dominions, and vnder the obedience of the King of *England*: (for I speake alwaies, and would be vnderstoode of kingdomes and

domir

dominions in possession, and vnder obedience, and not of those whereunto the King hath right, but hath no possession or obedience.) I houlde, that in all points materiall concerning this Question they are alike, though not in all things: (for, then it were *Idem*, and not *Simile*:) and this can not bee better vnderstoode, than by examining the Obiections to the contrary: which in substance may bee reduced to foure in number.

First for *Ireland*, it was gotten by Conquest, and the Conquerour may impose what Lawes hee will vpon them: But it is otherwise of kingdomes comming by discent.

*Ireland:
Obie&t. I.*

This is a conceipted difference, and lacks the foundation of Reason, and hath not the true parts of a difference: for those that are borue in *Ireland*, and those that are borne in *Scotland*, are all alike for their birth within the Kings Dominions, and

Respon&.

are borne vnder the like subiection and obedience to the King, and haue the like bond; Nay, euен the same bond of Allegiance; That is, they are borne *Ad fidem Regis*.

Besides, where it is said, The Conquerour may impose what Lawes hee will: Then consider how it was in the Interim before King *John* gaue lawes to *Ireland*.

Nay, which is more, I aske whether the Conquerour of *Ireland* can giue new lawes to *England*, and make Irish men to bee as naturall borne subiectes in *England* (if their birth-right doe not giue it them) which before the Conquest they were not? for, that is properly the Question: But if any difference bee, the Case of descent is the stronger: For, (as *Iustice Yelverton* saide) that is by an vndoubted Title made by lawe; the other by a doubtfull Title wonne by the Sword.

But leauie *Ireland* gotten by Conquest; what say you to the great kingdome of

France ; which *Edward* the third had first in right by lawfull descent, and after in possession by triumphant Conquest ; and vwhich *Henry* the sixt held after in possession by descent ? Was euer doubt made, Whether the subiects borne there so long as it vvas in subiection and obedience to the King, vvere capable of landes in *England* ?

I vwill now turne the Case, and aske an other Question ; If King *James* our Soueraigne had first beene King of *England* by lawfull descent (as now hee is) and after *Scotland* had descended vnto him, should not the Subiects of *Scotland* (I speake still of *Post-nati*) haue beene iudged as Naturall subiects in *England*, as those of *France* were in *Edward* the thirds time ?

Then, he hauing now both kingdomes by lineall, true, and lawfull descent, it can make no difference touching the capacite of Subiects, vwhich kingdome descended to him first, and vwhich second ; but both are to him alike. And it is cleere,

Post-nati in *England* are now capable and inheritable in *Scotland*, though some haue made a causelesse and needelesse doubt of it : and so on the other side those of *Scotland* are in *England*.

Normandy
and Aquitany.
Obiect. 2.

It is said, *Normandie* and *Aquitanie* were no monarchies or kingdomes, but dukedomes or seigniories in *France*, and holden of the Crowne of *France*, and therefore not to bee resembled to *Scotland*, which is an ancient and absolute kingdome.

Responſ.

This Obiection reacheth not to the reason of our Question : For, bee they kingdomes, bee they Seigniories, yet the subiectes borne there, were borne out of the kingdome of *England*, and so in that respect Aliens : But in that they were borne within the kings dominions, and vnder his subiection and obedience, they were no Aliens but liege and naturall borne subiectes to the King ; and so capable and inheritable in *England*.

I say besides, the Dukes of *Normandie* and *Aquitany* were absolute Princes, and had soueraigne power in those countries, although they did not beare the name of kings ; as at this time the Duke of *Sauoy* ; the duke of *Florence* ; the Duke and State of *Venice* ; and of late, the great Duke of *Russia* ; the Duke of *Burgundy* ; the Arch-
duke of *Austria*, &c.

So the difference in Stile and Name makes no difference in Soueraignty : For, king *Henry* the eight had as absolute soue-
raignetie in *Ireland*, vwhen his Stile was Lord of *Ireland*, as when hee changed his Stile, and was called, *King of Ireland*.

And, to say, That the tenure of the Crowne of *Fraunce* should giue any priu-
ledge to them of *Normandie* and *Aquitanie* in *England* is a strange conceipt ; It might rather bee obiected against them. But, as I saied before, they were borne within the kings Dominions, and vnder his obe-
fiance, and therefore as subiects borne in *England*.

And

And if men may beleue some auncient Stories, *Aquitany* and *Normandy* had sometimes kings, and were kingdome of them-selues : and not depending nor subiect to the Crowne of *France* : and the kingdome of *France* was then a small portion of *Gallicia*, and but a little one, in comparison of that which it is at this day. And some say, that there were foure and twentie kings in *Gaule*: But as the kings of *France* increased in povver and strength, they subdued their neighbor-Princes, and so that kingdome grew to that greatness that now it is at; euен as the *Heptarchie* in *England* was dissolued, and made an intire kingdome, when one of the kings mightier than the rest subdued his neighbors.

The Crowne
and great seale
of England.
Obiect. 3.

Respons.

It is saied further, that *Normandy* and *Aquitany* vvere subiects to the Crowne of *England*; and to the great Seale of *England*; but to is not *Scotland*: Ergo &c.

This standeth not wel with that which

was obiected before ; That they were but Seignories houlden of the Crowne of *Fraunce*. And it is true, that before Edward the thirds time, those Kings of *England* that held those great Seignories, did acknowledge, that they held the same of the Crowne of *Fraunce*.

But these Obiections be light, and not worth the time that hath beene spent about them. The Soueraignetie is in the person of the King ; the Crowne is but an Ensigne of Soueraignety ; the Inuesture and Coronation are but Ceremonies of honour, and maiestie : the King is an absolute and perfect king before he be crowned, and without those Ceremonies.

The Seale is to be altered and changed at the will and pleasure of the King : hee may haue one, hee may haue many, as pleaseth him. The King did vse Queene *Elizabeths* Seale, for diuerse moneths after his comming into *England* : Queene *Elizabeth* vsed king *Philips* & queene *Maries* Scale for a time ; and queene *Marie* v-

ed king Edwards seale. And all that vvas so done, was well and lawfully done. Many things were done by auncient kings of *England* before the Conquest by their signature, and signe manuell without anie seale at all; and some such since the Conquest also: as Graunts made by *Maudethe Empresse* to *Albericke de Vere*, and others.

The King may by his great seale com-
maund all his subiectes that bee vnder his
obedience wheresoeuer they bee in the
world: So he did in *Normandie*; so he did
in *Aquitany*; so hee did in that part of *Scot-
land* that he had in possession. And in 24.
Edw. r. his Judges kept ordinary Courts
of iustice there: and I haue seene the Re-
cords of *Placita Exercitus Regis apud Edin-
burgh*, *Apud Roxburgh*, *Apud S. Johns-towne*,
&c. in Scotia. So hee may commaund his
subiects, if they be in *France*, *Spaine*, *Rome*,
or *Turkie*, or the *Indies*. And for seuerall
seales, the Earle of *Chester* had a speciall
seale for that his auncient County *Palatine*.
The Duke of *Lancaster* had a speciall seale

for his new Countie *Palatine*. And after, when these Counties came to the kinges possession, the Kinges continued severall seales in them both for the administration of iustice ; but as subordinate to the great Seale of *England*.

And I make little doubt, but if the King shall now commaund any of his subiects of *Scotland* vnder his great seale of *England*, they will (as they ought) duetifullly obey him. As in king *Edward* the 1. *Edward* the 2. and *Edward* the 3. times they comman- ded many of the Lordes of that parte of *Scotland* which then was vnder their obe- dience.

I finde, that in 13. *Edw.* 2. quarto die Junij, the King *Constituit Adomarū de Valentia co- mitem Pēbrochiae Custodem Regni sui; ac locum suum tenentē quamdiu Rex in partibus trans- marinis morā fecerit.* And the next day, viz. Die Iouis quinto die Junij Rex ordinauit, quod magnum Sigillum suum remaneret clausum in liquo loco seculo, dum Rex esset in partibus

transmarinis. : Et ordinavit quoddam aliud paruum Sigillum interim pro regimine Regni, ad brevia, &c. Consignanda, sub Teste Adomari de Valentia Comitis Pembroch. Nota, heere was a petty Seale pro regimine Regni, wherein are comprised Commissiones for Iustice, Mandatoria, & ad brevia consignanda; which is for Remedialia as they are termed.

General Laws.
Object. 4.

It is saide, that Scotland hath Lawes that are proper for that kingdome, & that they are not subiect to the lawes of England, and so è contra.

And lastly it was saide, that in England euery person was within the iurisdiction of some Leete, and at the age of twelue yeares euery one is to bee sworne in the Leete to bee Foiall and Loiall to the King of England; That is, to the Lawes of England, (for so hee vnderstoode Loiall:) But Post-nati in Scotland can not be so; and that they haue an other forme of oathe in Scotland: Ergo, &c.

Repons.

For this last parte ; of the Oathe in the Leete , the Lord chiese Baron did cleere it so plainly , as more needes not to be said. This is *Legalis ligantia* , It is not *Alta ligantia* by birth, which is that which we haue now in question.

The Historicall discourse that hath bin made of Leetes, of Law dayes, of *Decenna*, *Decennarij*, of the Tenne-mens Tale, and the Oathe of all Male children of twelue yeeres, &c. taken at the Leete, is no newes indeede, it is very olde.

Master *Lambard* hath it all, and more too, at large in *Explicatione verborum* in the word *Centuria* ; It vvas before the Conquest.

But it maketh no hing to this naturall Allegiance and subiection of birth ; it is not *Alta ligantia* by birth-right ; it is but *Legalis ligantia* by Policie : And *Fitzherbert* calleth it *Swearing to the Lawe*.

And if that were the onely Bond and Marke of Allegiance, many are out of it, and so at libertie . As , children vnder

Lambard in explicatione verbi Centuria.

twelue yeeres ; yet sometimes they may commit treason and felony ; where, *Mali-tia supplet etatem* : So women of all sortes yet they may bee shrewd and daungerous traitours ; and if they bee women nobly borne , or widowes that were wiues to noble men, they shall be tried *per pares*.

Also Noble men of all sortes, who are neither bound to attend the Leete, nor to take that Oathe , as appeereth by *Britton cap. 29.* treating of the Court called *The Shirifes Turne*, out of which the Leete seemeth to be extracted : For, whatsoeuer is not presented in the Leete may bee presented and punished in the *Shirifs Turne*. And M *Kitchin* citeth *Britton* in this point for the Leete ; and alleadgeth also the statute of *Marlebridge cap. 10.* to the same purpose.

And at this day the view of Francke-pleges, and the putting in of Francke-pleges, and the *Decennarij*, are but bare names of things past, the vse and substance is obsolete and gone.

And, as it was saide, few in this place haue put in such Pleges, or taken that Oath, and yet I trust wee are good subiects, and beare true faith and allegiance.

But this hath beene so fully answered and cleared by the Lord chiefe Baron, and the Lord *Coke*, chiefe Justice of the Common pleas, as I doe wrong to spend time in it.

But touching the severall Lawes; I say, that severall lawes can make no difference in matter of Soueraigntie; and in the bond of *Allegeance* and obedience to one King: And so it concludeth nothing for the point in question.

Normandy and *Aquitany* had severall lawes differing from the lawes of *England*: so had *Fraunce* in King *Edward the 3.* and *Henry the 6.* his tyme.

Ireland, before king *Johns* time continued their auncient Lawes, and so, for the most part, haue done euer since.

Gernesey and *Jersey* haue yet at this day

seuerall lawes, which, for the most part, were the auncient Lawes and Customes of Normandie.

Wales had, & in many things yet haue seuerall Lawes: so for the County Palatine of Chester also.

Yet these neuer were, nor must not be cancelled and cut off from their allegiance and obedience to the King; nor the Kings subiects borne there be incapable of lands and inheritaunce in *England*: for vwhere there is but one Soueraigne, all his subiects borne in all his Dominions bee borne *Ad fidem Regis*; and are bound to him by one bond of Faith and Allegiance: And in that one is not greater nor lesser than an other: nor one to bee preferred before another: but all to bee obedient alike; and to be ruled alike; yet vnder seuerall Layves and Customes. And as Saint Gregorie sayeth of the Church, *In una fide nihil offici Ecclesiae sanctae diuersa consuetudo*. So I will conclude for this point, That diuersitie of Layves and Customes makes no

breach of that vnitie of obedience, faith, and allegiance which all liege subiects owe to their liege King and Soueraigne Lord. And as none of them can be Aliens to the king, so none of them can bee Aliens or Strangers in any of his kingdomes or dominions; nor Aliens or Strangers one to another, no more than a Kentishman, to a Cheshire-man; or *e contra*.

And therefore all that haue bin borne in any of the kinges dominions since hee was King of *England*, are capable and inhe-
ritable in all his Dominions without ex-
ception.

And as to the other parte of the Obie-
ction, that there will be defect of triall; for, things done in *Scotland*, cannot bee tried in *England*; I say, that that maketh little to our present Question, whether *Post-nati* in *Scotland*, be Aliens in *England*, and not capable of landes in *England*: but it trencheth to cast some aspersion y-
on the common lawe of *England*; That

Defect of
Triall.

it is not sufficient to giue iustice to the Kinges subiectes for lacke of sufficient meanes of triall of questions of fact : but to this baron *Altham* gaue so full an aunswere , as more cannot bee saied : And so hee did both cleare the doubt , and did vphould the sufficiencie of the lawe of *England* in that behalfe. And it seemeth strange , that this should now bee found out to bee obiectected against *Scotland* , since it vvas neuer heeretofore obiectected for *France* , *Normandie* , *Aquitany* , nor is at this day for *Ireland* , *Gernesey* , and *Jersey* , &c. whereas all stand vpon the same reason for the point of triall. But the wisedome of the lawe of *England* hath beene such , as there neuer failed certen rules for triall of all questions in fact ; and those were fittet and adapted to the Matter which was to bee tried. And therefore , whosoeuer doth diligently obserue it , hee shall finde in the course and practise of the lawes of *England* aboue twenty severall formes of trialls : as by Battell ; by Iurie , and that

in diuerse kindes ; by Wager of Lawe ; by Proothes ; by Examination ; by Inspection ; by Certificates of diuerse kindes ; and by manie other wayes : And lest there should bee any defect in that behalfe , the Law hath prouided seuerall formes of *Joyning of issues* ; and in that , hath speciall regard of things done out of the Realme , as euerie Student may see in the Bookes of Reports.

Thus I haue passed these foure Obiections , and therefore for this part I conclude , That if *Argumentum à simili* were euer good and concludent in Lawe , my Lords the Judges haue proued this Case by so many plaine and direct Examples , and like Cases ; and by so manie strong arguments & solide reasons drawne out of Booke Cases , out of Statutes , out of the true rules and forme of pleading , and out of ancient Records and Precedents , some produced by M. Atturney , and many more remembred by the Judges , as no

one thing can bee more plainly exemplified, nor appeare more like to an other, than this Case is to those Cases which they haue remembred.

Recurrend ad
Rationem.

But if examples and arguments à simili doe faile, then it remaineth Recurrere ad Rationem ; and what reason that ought to bee, and how to bee vnderstoode, is to be considered : for, it is said, that *Lex est ratio summa, iubens ea quæ facienda sunt, & prohibens contraria.* So it must be the depth of reason, not the light and shallow dis-tempered reasons of common Discour-sers walking in Powles, or at Ordinaries, in their feasting and drinking, drowned with drincke, or blowne away with a whiffe of Tobacco. *Lucretius* noteth, that in many there is *Rationis egestas* : And saint Gregory saith, *Qui in factis Dei rationem non videt, infirmitatem suam considerans cur non videat, rationem videt.* For, although Reason and Knowledge bee infinite, yet no man can haue more of it than hee is capable of: Euery man must receiue it, and keepe it

in his owne vessell ; he cannot borrow his neighbours braine-pan to put it in . And therefore it is not without cause , that one of the grauest and best learned Lawyers of our age , and a priuie Counsellor to one of the greatest Monarchs of Europe , describeth those that should bee Interpreters of Lawes by foure speciall qualities , That is , 1. *A Etate graues* , 2. *Eruditione præstantes* , 3. *Vsu rerum prudentes* , 4. *Publica authoritate constituti* : So, there must be grauitie , there must be learning , there must be experience , and there must be authoritié : and if any one of these want , they are not to be allowed to be Interpreters of the Lawe .

How all these Qualities concurre in these reuerend Judges , whom wee haue heard in this present Case , I will spare to speake vwhat I thinke : For , Chrysostome teacheth mee , *Qui laudatur in facie , flagellatur in corde* . In seeking out this depth of Reason ,

Hoppperus de
vera Iuris pru-
dentia pag. 118

no ge feld
justrop in hwb
lancet .

Qui laudatur
in facie
flagellatur in
cordo .

Hopperus ibid.
pag. 119.

the same Author giueth a caution , which is this ; *Vitium quod in hoc genere fugi debet est, ne, si Rationē non inuenias, mox legem sine ratione esse clamēs.* And in 36.H.6.Fortescue saith the same in effect , which is thus ; *We haue many Courses and Formes which bee houlden for Lawe, and haue beeene houlden and vsed because of Reason ; and notwithstanding the reason be not ready in memory, yet by study and labour a man may finde it.*

Now when wee come to examine by reason , whether *Post-nati* in Scotland shall be disabled as Aliens , or shall be capable of lands in *England* , as naturall borne subjects there ; wee are first to consider what is the reason whie Aliens in the Dominions , and vnder the obedience of other forraine Princes , are nor capable of landes in *England* : And surely, the true reason is, that which was noted by baron *Altham* ; and hath since beeene ofte remembred, viz. The danger that might thereby come to the king and the common-weale : Special-

ly by drawing hither too great multitudes of them: for so the Treasure of the Realme might bee transported by them into other forraine Kingdomes and Countries; whereby it might bee vsed against the King, and to the preiudice of the State. And besides, they might vnder-hand practise Sedition and Rebellion in the kingdome, and cause many other daungers and inconueniences: but that reason cannot serue against *Post-nati* in Scotland, now that there is but one King of both the kingdomes, no more than it can serue against those that are borne in Ireland, or Gernesey, or Jersey: and therefore in reason they are as capable of landes in England, as the kings subiects of Ireland, and Gernesey, and Jersey are.

Against this, there haue also beene many Obiections made, and Reasons deuised that seeme witty, and haue some shew of probability to proue that *Post-nati* in Scotland are Aliens, and ought not in reason

Obiections.

to

to bee capable of landes in England, videlicet: That England and Scotland were two ancient severall kingdomes vnder severall kings, and severall crownes.

2. That they continue yet severall kingdomes, having iudgim vnde, & obilat batelis. That they haue yet severall Lawes, severall Seales, severall Crownes, and severall Kings: For, it is said, though king James be king of both, and hath but one naturall body, yet in iudgement of Law, he is in respect of his two severall kingdomes, as two severall kings, and the subiects of each severall kingdome are bound to him by distinct allegiance, according to the severall Lawes of the kingdome where they were borne.

And all this is grounded vpon this rule or fiction in Lawe: *Quando duo iura concurrunt in una persona, aequum est ac si essent in diversis.*

And vpon this ground is this new form of pleading devised, which the Defen-

dants haue vsed in this Case , such as can-
not be found in any Record , euer to haue
beene pleaded before ; and may as well
serue against the Kinges subiectes of Ire-
land , as against the *Post-nati* of Scotland .
And sithence in former times the like
forme of pleading vvas neuer seene a-
gainst any of the Kings of *Englandes* sub-
iectes , which were borne in any of his do-
minions out of *England*, as in *Normandie* or
Aquitanie, or in *France* (I meane such part
of it as was in the Kinges possession , and
in subiection and obedience to him , and
not in that parte of *France* which his ene-
mies helde) it may be probably inferred ,
That it was then generally houlden , that
neither such a forme of pleading , nor the
Matter it selfe was sufficient in Lawe to
diable anie such Plaintiff : for , against
French-men that vvere not vnder the
Kings obedience wee finde it often plea-
ded . And as those that were not subiects
to the King , nor borne vnder his obedi-
ence , did then presume to bring suites ,

and actions in *England*. So it can not bee thought, but that the king hauing then so large and ample Dominions beyond the Seas, as *Normandy* and *Aquitany*, and many other partes of *France*, some of his subiects borne there, had cause to haue, and did bring the like suites in *England*. And sithence no such Plea is found to haue beene then vsed against them, it can not in Lawe and Reason bee now allowed against the *Post-nati* in *Scotland*: For, I may say as *Ascue* saied in 37. H.6. *Our Predeces-
sors were as sage and learned as we be.*

And I see not, but that in this Case a good Argument may bee reasonably deduced from the Negatiue, as it was in the Case reported by the great learned, and most graue and reuerend Judge sir *Jame Dyer* chiefe Iustice of the Common pleas, Anno 23. Elizab. The Question there, was Whether an erroneous iudgement given in *Rie*, which is a member of the *Cinque portes*, might bee reuersed in the kings Bench, or Common place at *Westmin-*

P. 23. Elizab.
Dycr. 376.

ster ; And it was thus resolued ; *Sed pro eo quod nullū tale breue in Registro, nec in aliquibus Pr̄ecedentibus curiarum predictarū inueniri potuerat*, dominus Cancellarius Bromley per opinionem Capitalium Iusticiariorum utriusque Banci denegauit tale breue concedere. And so Iustice Fenners argument houldeth well, viz. There is in this Case no lawe to exclude the Complainant, Ergo hee is a liege and a naturall borne subiect.

But the forme of pleading in the time of king Ed. i. in Cobledickes case, which was cited out of *Hengam*, (and the Booke shewed heere by the Lord chiefe Iustice Coke) is so direct and plaine for this our Question, as nothing can be more plaine : and therefore I thinke it not amisse to report it againe.

That Case was in effect and substance, thus :

A woman brought a Writte of *Ayel* against *Roger Cobledicke*, and declared of the seisin of *Roger* her Grand-father, and conueied the dissent to *Gilbert* her father;

Lo : Coke

note

and from him to the Demaundant, as his daughter and heire. The Tenant pleaded, that the Demaundant was a French-woman, and not of the ligeance nor of the fidelitie of *England*; and demaunded iudgement if shee ought to haue the action against him. This plea vvas houlden to bee insufficient; and thereupon the tenant amended his plea, and pleaded further, That the Demaundant was not of the ligeance of *England*, nor of the fidelitie of the King; and demaunded iudgement, &c. And against that plea none exception was taken, but thereupon the Demaundant prayed licence to depart from her Writ. By this it appeareth plainly, that the first plea, alleadging that she was a French-woman, and not of the ligeance, nor of the fidelitie of *England*, was insufficient (and so declared by Berreford the chiefe Iustice;) For, there can bee no fidelitie nor allegiance due to *England*, respecting the land and soile without a Soueraigne and King. But the second Plea

alleging

alledging, that shee was not of the lige-
ance of *England*, nor of the fidelitie of the
King, was good and sufficient: For, to
the King fidelitie and allegiance is due;
and therefore, since shee failed in that, she
was not to be answered: and thereupon she
prayed licence to departe from her Writte,
and so she left her suite.

Now, for the reasons which haue beeene
drawne and strained out of the Statute *An.*
14. Edw. 3. if they bee well examined, they
serue little for this point which we haue in
hand.

It is to be considered, at what time, and
vpon what occasion that Statute was made:
King *Edw.* the third being right heire to
the Crowne and Kingdome of *Fraunce* by
descent from his Mother, and hauing
spent many yeeres for the recovering of
the same, resolued to take vpon him the
Name and Stile of *King of France*; being
aduised thereunto by them of *Flaunders*:
Hereupon he did take the Stile of *King of*

Stat. 14. Ed. 3.
That the
Realme of
England shall
not be subiect
to *France*.

Fraunce ; and altered his Seale and his Armes ; and after a while , placed the Armes of *France* before the ancient Armes of *England* ; as they are borne at this day . This gaue occasion for the making of this statute : for some people (*Ascungentes* , saith the statute) seeing this change , and considering the large and ample extent , and the magnificence of that great Kingdome , beganne to doubt that the king would make his Imperiall seate there ; and conceiued thereby , that the kingdome of *England* , being the lesser , should bee in subiection of the king and kingdome of *France* , being the greater , and to bee governed and ruled by a Vice-Roy , or Deputy , as they saw *Ireland* was . And though in the King's Stile , *England* was placed before *France* , yet they sawe the Armes of *France* marshalled before the Armes of *England* ; though at the first bearing thereof some say it was not so .

To cleere this doubt , and to take away this feare from the Subiects of *England* ,

was this Statute made, as doth plainly appeare by the wordes of the statute it selte.

Now if you will make an apt and proper application of that Case then betweene *England* and *Fraunce*, to this our Case now, betweene *Scotland* and *England*, it must be thus:

1. *Edw. 3.* then king of *England* (being the lesser) had afterwardes the kingdome of *Fraunce* (being the greater) by descent, and tooke the Stile of *King of France*.

King *James* king of *Scotland* (beeing the lesser) hath afterward the kingdome of *England* (being the greater) by descent, and taketh the Stile of *King of England*.

2. King *Ed. 3.* altered his Seale, and his Armes, and placed the Armes of *Fraunce* before the Armes of *England*.

King *James* hath changed his Seale, and his Armes in *England*, and hath placed the

Armes of *England* before the Armes of *Scotland*.

3. It was then doubted, that King *Edw.* 3. would remoue his Court out of *England*, the lesser, and keepe his Imperiall seate and state in *France*, the greater.

King *James* hath indeede remooued his Court out of *Scotland*, the lesser, and doth in his royll person (with the Queene and Prince, and all his Children) keepe his Imperiall seate in *England*, the greater.

4. In al these the cases agree; but yet one difference there is, and that is in the Stile: For king *Ed. 3.* in his Stile placed *England*, the lesser, being his ancient kingdome, before *France*, the greater, being newly descended vnto him.

But King *James* in his Stile placeth *England*, the greater, though newly descended vnto him, before *Scotland*, the lesser, being his ancient kingdome.

5. Now, this being thus ; perhappes *Scotland* might out of this Example haue conceiued the like doubt against *England*, as *England* did then against *France* : But as there was then no doubt made, whether the kings subiects borne in *England* should be capable of lands in *France*; so, out of this Statute, and vpon this example no doubt can bee inferred, whether the kings subiects now borne in *Scotland*, shall be capable of lands in *England*.

But, all these Obiections, and the ground whereupon they are framed, *viz.* *Quando duo iura &c.* haue beeene so thorowly and profoundly examined, and so learnedly and fully answered and clee red by the Judges, as I make no doubt but all wise and indifferent hearers be well satisfied therein.

And if there bee any so possessed with a preiudicate opinion against Trueth, and Reason, that will say in their owne heartes *licet persuaseris non persuadebis* ; & so, either Serpent-like stop their eares, or else wil-

fully absent themselues , because they would not heare the weaknesse and absurdities of their owne conceipts laied open and confuted : If there bee any such I say (as I trust there bee but few , and yet I feare there bee some) I would they had learned of *Tertullian* , That *Veritas docendo suadet , non suadendo docet* . And I wish that they bee not found among the number of those to whome Saint *Paul* saith , *Si quis ignorat , ignorat : And Saint John in the Apocalips , Qui sordidus est , sordecat adhuc* . And I will exhort with Saint *Paul* . *Qui tenet , tenet , and not wauer or doubt by such weake arguments and obiections.*

A dangerous distinction be-
tweene the
King and the
Crown.

But in this new learning , there is one part of it so strange , and of so daungerous consequent , as I may not let it passe , viz . That the king is as a king diuided in himselfe ; and so as two kings of two severall kingdomes ; and that there be severall allegeances , and severall subiections due unto him respectiuely in regard of his severall

rall kingdomes, the one not participating with the other.

This is a daungerous distinction betweene the King and the Crowne, and betweene the King and the kingdome: It reacheth too farre; I wish euery good subiect to beware of it. It was neuer taught, but either by traitours, as in Spencers Bill in Edward the seconds time (which Baron *Snig*, and the Lord chiefe Baron, and Lord *Coke* remembred) or by treasonable Papists, as *Harding* in his Confutation of the Apologie maintaineth, that Kings haue their authority by the positiuue Lawe of Nations, and haue no more power, than the People hath, of whome they take their temporall iurisdiction; and so *Ficlerus Simanca*, and others of that crew.

Or by seditious Sectaries and Puritans, as *Buchannon De Iure Regni apud Scotos*, *Penry*, *Knox*, and such like.

For, by these, and those that are their followers, and of their Faction, there is in

their Pamphlets too much such traiterous
seede sowne.

Absurdities in
this dange-
rous distinc^on

But leauing this, I will adde a little
more, to prooue, that in reason Robert Cal-
uine, and other like Post-nati in Scotland,
ought by Lawe to be capable of landes in
England: and for that, I wil remember one
rule more which is certen and faileth not,
and ought to bee obserued in all Interpret-
ation of Lawes; and that is, Ne quid ab-
surdum, ne quid illusorium admittatur.

But, vpon this subtle and dangerous
Distinction of Faith and Allegiance due
to the King, and of Faith and Allegiance
due to the Crowne, and to the Kingdome
(which is the onely Basis and fundamen-
tall maine reason to disable the Plaintiff,
and all Post-nati) there follow too many
grosse, and fowle absurdities, whereof I
will touch some few, and so conclude, that
in Lawe and Reason this subtle, but absurd
and dangerous distinction, ought not to
be allowed.

This Bond of Allegiance whereof wee dispute, is *Vinculum fidei*; it bindeth the soule and conscience of euery subiect severally and respectiuely, to be faithfull and obedient to the King: and as a Soule or Conscience cannot bee framed by Policie; so Faith and Allegiance cannot bee framed by Policie, nor put into a politike bodie. An oath must be sworne by a naturall bodie; homage and fealtie must be done by a naturall bodie, a politike body cannot doe it.

Now then, since there is but one king, and soueraigne, to whome this faith and allegiance is due by all his subiects of *England* and *Scotland*, can any humane policie diuide this one King, and make him two kings? Can *cor Regis Angliae* be in *manu Domini*, and *cor Regis Scotiae* not so? Can there bee warres betweene the King of *England*, and the king of *Scotland*? or betweene the kingdome of *England*, and the kingdome of *Scotland*, so long as there is but one king? Can the king of *England* now send

an army roial into *Scotland* against the king of *Scotland*? Can there bee any Letters of Marke or Reprisall now graunted by the king of *England*, against the subiects of the king of *Scotland*? Can there bee any Protections now, *Quia profecturus in exercitu Iacobii Regis Anglie in Scotiam?*

Nay shortly, Can any man bee a true subiect to King *James* as King of *England*, and a traitor or rebell to king *James* as king of *Scotland*? Shall a foote breadth, or an inch breadth of ground make a difference of birth-right of subiects borne vnder one king? Nay, where there are not any certe bounds or limites knowne at all, but an imaginarie partition wall, by a conceipted fiction in Lawe? It is enough to propound these and such like Questions, whereof many more might be remembred: they carry a sufficient and plaine answeare in themselues: *Magis docet qui prudenter interrogat.*

notes

As the King nor his heart cannot bee

diu-

liuied, for hee is one entire King ouer all his subiectes, in which soever of his Kingdomes or Dominions they vvere borne, so hee must not bee serued nor obeyed by halues ; hee must haue intire and perfect obedience of his subiects : for, *Ligentia* (as Baron *Heron* saied well) must haue foure qualitez ; It must bee 1. *Pura & simplex* : 2. *Integra & solida* : 3. *Vniuersalis non localis* : 4. *Permanens, continua, & illesa*. Diuide a mans heart, and you lose both parts of it, and make no heart at all ; so hee that is not an intire subiect, but halfe faced, is no subiect at all ; and hee that is borne an intire and perfect subiect, bought by Reason and Lawe to haue all the freedomes, priuiledges, and benefites pertaining to his Birth-right in all the Kinges Dominions ; and such are all the Post-nati in *England* and *Scotland*. And the inconuenience of this imaginary locall allegiance hath beene so lately, and so ful- ly declared by the Lorde chiefe Iustice *Coke*, as more needes not bee saied in it.

Baron Heron

Notes

King may bee
Subiects w^t
land: But
we may not
be a King
w^t land not
w^t Subiects

In some speciall Cases there sometime
may bee a king of subiects without land in
possession, as Iustice Fanner noted in the
gouernement which Moses had ouer the
people of *Israel* in the wildernesse; and as
in the Case which sir *John Popham* the late
Lord chiefe Iustice did put in the Parlia-
ment: If a King and his subiects bee dri-
uen out of his kingdome by his enemies,
yet notwithstanding hee continueth still
King ouer those subiects, and they are still
bound vnto him by their bond of alleg-
iance, whereloeuer hee and they bee: But
there can not bee a King of land without
subiects: For, that were but *Imperium in
belluas*, and, *Rex & subditi sunt relativa*.

*Rex solus iudi-
cat &c.*

rule
giv^e
quov^e

I saied there was an other generall rule
for expounding of Lawes, which I refe-
red to bee last spoken of, I will now but
touch it; for, I will not stand to examine
by humane reasons, whether Kings were
before Lawes, or Lawes before Kinges;
nor how Kings were first ordained; nor

al

wh^e

whether the kings, or the people did first make Lawes ; nor the seuerall constitutions and frames of states and commonweales ; nor what *Plato* or *Aristotle* haue written of this argimment.

They were men of singuler learning and wisedome, but wee must consider the time, and the countrie in which they liued, and in all their great learning they lacked the true learning of the knowledge of God. They were borne and liued in *Greece*, and in popular States : they were enemies, or at least mislikers of all Monarchies ; yet one of them disdained not to bee a seruant or mercenarie hireling to a Monarch. They accompted all the world barbarous, but their owne Countrey of *Greece* : their opinions therefore are no Cannons to giue Lawes to kinges and kingdomes, no more than sir *Thomas Moores Utopia*, or such Pamphlets as wee haue at euerie Marte.

I beleue him that saith, *Per me Reges regnant, & Principes iusta decernunt*; And

4 blocks of writing
were made
in two rows
of wodden
principles
e wodden
marked. We
leaving a
know. of

in Greece to
leave

Prover. 8.

I make no doubt, but that as God ordai-
ned kings, and hath giuen Lawes to kings
themselues, so hee hath authorized and
giuen power to Kings to giue Lawes to
their subiects ; and so kings did first make
lawes, and then ruled by their lawes, and
altered and changed their Lawes from
time to time, as they sawe occasion, for
the good of themselues, and their sub-
iects.

And this power they haue from God
almighty ; For, as Saint Augustine saieth, *In
hoc Reges Deo seruiunt sicut eis Diuinitus pre-
cipitur, in quantum sunt Reges, si in suo Regno
bona iubeant, mala prohibeant, non solum que
pertinent ad humanam societatem, verum etiam
que ad diuinam religionem.*

And I hould *Thomas Aquinas* his opini-
on to be good, *Rex solutus à Legibus quoad
vim coactiuam, subditus est legibus quoad vim di-
rectiuam propria voluntate.* And for this o-
pinion there is a stronger authoritie, even
from God himselfe in *Ecclesiastes, ca. 8. ver.
2. Ego os Regis obseruo; Et præcepta iuramenti*

mota

mota

Dei:

*Dei: & ver. 4. Sermo illius potestate plenus est:
Nec dicere ei quisquam potest, quare ita facis?*

Now beeing led a little from the Common Lawe to the Ciuite Lawe, I finde in the ciuite Lawe a direct Text, warranting that generall Rule which I reserued to this place, which is this; *Inter aequitatem iusque interpositam interpretationem nobis solis & licet & oportet inspicere.*

And another like Text in these words, *Sententia Principis Ius dubium declarans, Ius facit quoad omnes.* And some graue and notable Writers in the ciuite Lawe say, *Rex est lex animata:* Some say, *Rex est lex loquens:* Some others say, *Interpretantur legem consuetudo & Princeps:* Another saieth, *Rex solus iudicat de causa à iure non definita.*

And as I may not forget Saint Augustines words, which are these; *Generale pactum est societatis humanæ regibus suis obtemperare:* So I may not wrong the judges of the common Lawe of England so much as to

*Cod. li. I. Tit. 24
le. I.*

Ibidem le. 12.

suffer an imputation to bee cast vpon
 them, That they, or the Common lawe
 doe not attribute as great power and au-
 thoritie to their Soueraignes the kinges
 of *England*, as the Romane lawes did to
 their Emperours: For, *Bracton* the chiefe
 Iustice in the time of king *Henry the third*,
 hath these direct wordes, *De Chartis Re-
 gis & factis regum non debent nec possunt Iusti-
 ciarij nec priuatae personae disputare. Nee etiam,
 si in illa dubitatio oriatur, possunt eam interpreta-
 ri. Et in dubijs & obscuris, vel si aliqua dictio
 duos contineat intellectus, domini Regis erit ex-
 pectanda interpretatio & voluntas; Cum eius sit
 interpretari cuius est condere.* And *Britton* in
 the time of king *Ed. I.* writeth as much in
 effect,

So as now if this question seem difficult,
 that neither direct law, nor Examples &
 Precedents, nor application of like cases,
 nor discourse of reason, nor the graue o-
 pinion of the learned and reuerend Iud-
 ges, can resolve it, here is a true and cer-
 ten Rule, how both by the Ciuite Lawe,

and the ancient Common lawe of *England* it may and ought to be decided: That is, by sentence of the most religious, learned, and iudicious king that euer this kingdome or Iland had.

But this Case is so cleare as this needeth not at all.

And in this I would not be mis-vnderstoode, as though I speake of making of new Lawes, or of altering the Lawes now standing; I meane not so, but I speake only of interpretation of the Lawe in new questions and doubts, as now in this present case: neither doe I meane hereby to derogate any thing from the high court of Parliament; (farre be it from my thought) It is the great Councell of the kingdome, wherein euery subiect hath interest. And to speake of the constitution or forme of it, or how, or when it was first begunne, is for busie Questionists; It ought to bee obeyed and reuerenced, but not disputed; and it is at this time impertinent to this Question.

But certen it is, it hath beene the wisedome of the Kinges of this Realme to reserue in themselues that supreame power to call their Nobles, Clergie, & commons together, when they sawe great and vrgent Causes ; and by that great Councell to make Edicts and Statutes for the weale of their people, and safetie of the Kingdome and State, as in *Anno 10. Edw. 3.* the Assembly at *Nottingham* for the great wars in *France* : And in *Anno 20. H. 3.* *Prouisiones Merton*, which I remembred before.

Obiect. of
Inconuenien-
cie and fruga-
litie.

Obiect. vpon
diffidence.

There haue beeene made some Obiections of inconueniencie, as for bearing of Scot and Lot, and such other charges; and some out of frugalitie, that the king shall lose his profit of making Denizens, and such like : These are so light as I leaue them to the winde ; They are neither fit for Parliament, nor Councell, nor Court

Another argument and reason against the *Post-nati* hath beeene lately made out

of diffidence and mistrust, that they will come into *England* sans number, and so as it were to surcharge our Common; and that this may be in *secula seculorum*. I know not well what this meanes. The Nation is ancient, noble and famous; they haue many honourable and woorthie Noble men and Gentlemen, and many wise and worthie men of all degrees and qualities; they haue lands and faire possessions in *Scotland*: Is it therefore to bee supposed, or can it in reason bee imagined, that such multitude sans number will leaue their natuе soile, and all transport themselues hither? Hath the Irish done so? Or those of *Wales*, or of the Isles of *Man*, *Gernesey*, and *Jersey*? Whie should we then suspect it now more for *Scotland*?

Nay, doe you suppose that the Kinge of *England* will euer suffer so great a parte of his Dominions, and so great and famous a Kingdome as *Scotland* is to be dispeopled? It is a doubt iniagined without any foundation or ground of reason.

But

But if it were to bee doubted, the twelue Judges that haue concurred in opinion, and that late worthy Judge *Popham* had as great cause to feare it as any others: They are wise, they are learned, they haue faire possessions and good estates, They haue posteritie to care for, as others haue.

Yet, admit it bee a matter worth the doubting of, what is that to the yoong *Post-nati* that are not like in many yeares to come hither in such number? Shall we vpon this causlesse feare depriue them of their lawfull Birth-right?

Haue wee seene in these fие yeeres past anie moe of them than this one alone that haue gotten any Lands in *England*? And this little that he hath is so small and poore a portion, that his purchase is not great, and therefore no iust cause of offence to any.

Nay, if you looke vpon the *Ante-nati*, you shall find no such confluence hither, but some few (and very few in respect

of that great and populous kingdome) that haue done long and worthie seruice to his Maiestie, haue, and still doe attend him, which I trust no man mislikes: For, there can bee none so simple, or childish (if they haue but common sense) as to thinke that his Maiesy shoulde haue come hither alone amongst vs, and haue left behinde him in *Scotland*, and as it were caste off, all his ould and worthie Seruants.

And if these Noble and worthie Gentlemen of *Scotland*, I meane the *Ante-nati* be louingly and brotherly entertained amongst vs, with mutuall loue & beneuolence, that so we may *coalescere*, & be vnited together, by marriage, and otherwise (as in some particular cases wee see it already happily begunne) no doubt God will blesse this Vnion of both these Nations, and make them, and the King, and great *Britaine* to be famous through the world; and feared & redoubted of our enemies, and of all that wish vs ill: For, *Vis unita-*

fortior, & concordia multos facit vnum. But what may follow vpon such arguments of diffidence and suspition, which seeme but to hinder Vnion, and to breedē discord and dissention I will not speake; Let euery wise man consider it well: For, *Hu-
mana consilia castigantur vbi cœlestibus se præ-
runt.* And remember Saint Paules caution,
*Si inuicem mordetis, videte ne ab inuicem consu-
mamini.*

And for the resemblance that hath bin made of this Case of Post-nati (but indeed for the Vnion of both Kingdomes) with the houswifes cutting of her cloth by a threedē, I will say but this, That if shee cut her peece of cloth in length aswell as in breadth, all the threeds will bee cutte, and the cloth marred. And this cutting in this our Case, is, to cutte all aswell in length as in breadth, eu'en through all the Kinges Dominions; and so will rent asunder the whole frame of the V-

nion ; and cut in peeces all the threeds of Allegiance.

But now I wil aske this question: How long shall this suspition and doubt continue? Shall there bee a dis-vnion for euer? If it bee saied, No, but vntill the Lawes, and Customes of both Kingdomes bee made one and the same: then I aske, how, and when shall that be done? And it may bee, that the Constitutions of the Countries bee such as there can hardly in all things bee such an absolute and perfect reconciling or vniting of Lawes as is fancied. Is it yet so betweene *England* and *Wales*? or betweene *Kent* and *Cornewall*? or betweene many other parts of this Kingdome? I say no; and I speake it confidently, and truely it is not so, nor well can be so. Therefore let *England* and *Scotland* be in like degree now, as *England* and *Wales* were for many hundred yeeres, and in many things are yet still; and yet let *Vnion* and *Loue* increase amongst vs,

A Question,
how long this
suspition and
dis-vnion shall
continue?

Bernard.

euē in secula seculorum. Let vs not be such as Saint Bernard noteth, *Amant quod non decet, timent quod non oportet, dolent vane, gaudent vanius*. And let vs no longer make question, whether seuerall Lawes and Customes bee markes of seperation and dis-vnion, or of seuerall Allegances; for certainly they are not.

Obiection vp.
on D. vination

One other Reason remaines against these *Post-nati*, and that is out of a prouident foresight, or as it were a prophesying: What if a seperation of these Kingdomes fall hereafter?

Responſ.

Of this I can say but *Absit omen*. It is *Potentia remota* (as Iustice *W*illiams saied) and I trust in God *Remotissima*: And I will euer pray to God that it neuer fall so, vntill the King of all Kinges resume all Scepters and Kingdomes into his owne hands. And let vs take heede of sinnes of Ingratitude and Disobedience; and remember, that *Adam and Eue were punished*, *Non*

propter

propter pomum, sed propter vetitum. And for such Prophets, let the Prophet *Ezechiel* ca. 13. answer them, *V& Proph&etis insipientibus qui sequuntur spiritum suum, & nihil vident.* And the Prophet *Esay* speaketh to all such with an other *V&*, *V& illis qui despurgunt.*

Now then, as M. Solicitor beganne with seeking out the truth; so I will conclude with *Esdras* words, *Magna est Veritas & praeualet: And with this further, Eatenus rationandum donec veritas inueniatur: Cum inuenta est veritas, figendum ibi Iudicium: Et in victoria veritatis, soli veritatis inimici pereunt.*

The Conclusion.

Thus I haue heere deliuered my concurrence in opinion with my Lordes the Judges, and the reasons that induce and satisfie my conscience, That Ro. *Calvin*, and all the *Post-nati* in *Scotland*, are in Reason, and by the Common Lawe of

England naturall borne subiects within the
allegeance of the King of *England*; and in-
habled to purchase and haue free-hould
and inheritance of lands in *England*; and
to bring reall actions for the same in *Eng-*
land.

For, if they haue not this benefit by
this blessed and happie Vnion, then are
they in no better case in *England*, than the
king of Spaines subiects borne in Spaine, &c.
And so by this Vnion they haue gotten
nothing: What they haue lost Iustice *Yel-*
uerton did well note.

And therefore I must giue Iudgement
in the Chancerie, That the Defendants
there ought to make direct answer to *Ro.*
Caluines Bill for the Lands and Evidences
for which he complaines.

T. Ellesmere Canc.

518. C. 2.
3

THE RELATION BETWEENE HE LORD OF A MANNOR AND THE COPPY-HOLDER His TENANT.

delivered in the Learned Readings of the late
Excellent and Famous Lawyer, CHAR. CAL-
THORPE of the Honorable Society of
Lincolnes-Inne Esq;

hereby it doth appeare for what causes a Coppy-
holder may forfeite his Coppy-hold Estate,
and for what not : and likewise
what Lord can grant a
Coppy, and to whom.

*Char. Cal-
thorpe - Esq.*

Published for the good of the Lords of Mannors,
and their Tenants

*Non magis pro manibus quam pro servandis legibus
liberi Cives pugnare debent, siquidem sine manibus
Respublica potest consistere sine Legibus non potest.*

LOND^{ON}:

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